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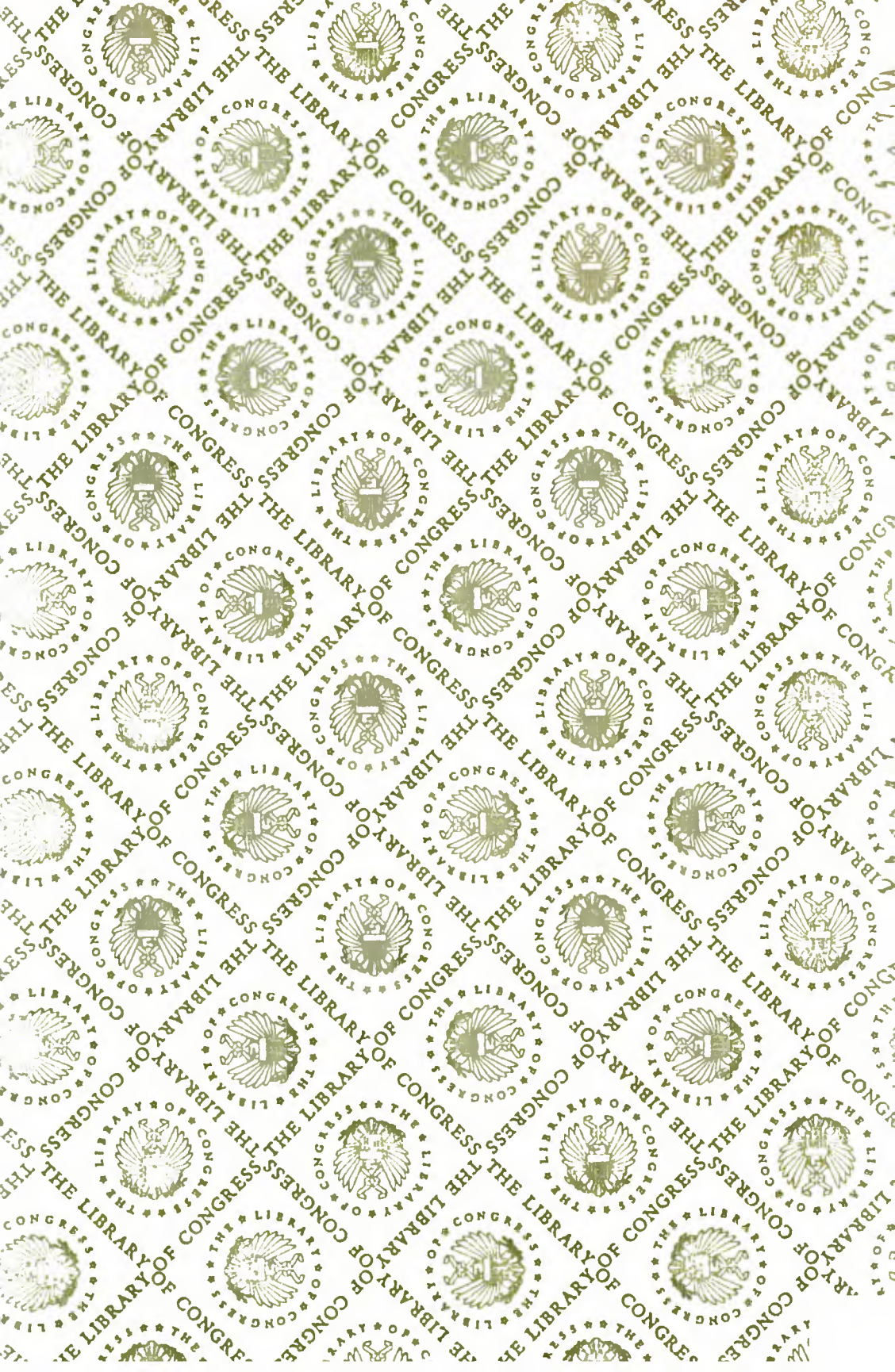
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UNITED STATES. CONGRESS. HOUSE. COMMITTEE ON THE JUDICIARY.
SUBCOMMITTEE ON THE CONSTITUTION.

PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 1999

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 2372

SEPTEMBER 15, 1999

Serial No. 15

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CONTENTS

PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 1999

WEDNSDAY, SEPTEMBER 15, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met at 10:05 a.m. in Room 2226 of the Rayburn House Office Building, the Honorable Charles T. Canady, chairman of the subcommittee, presiding.

Present. Representatives Charles T. Canady, Williams L. Jenkins, and Melvin L. Watt.

Staff present: Cathleen Cleaver, Chief Counsel; Bradley S. Clanton, Counsel; Susana Gutierrez, Clerk; Minority: Anthony Foxx, Minority Counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will be in order.

The fifth amendment to the United States Constitution prohibits the Federal Government from taking property for public use without just compensation.

This takings clause was made applicable to the States through the 14th amendment and has been held to require the Government to provide just compensation not only when property is directly appropriated by the Government, but also when governmental regulations deprive the property owner of all beneficial uses of his land.

Under current law, however, property owners whose property has been taken through Government regulation may not proceed directly to Federal court to vindicate their rights.

Instead, they must first clear two legal hurdles designed by the Supreme Court to help ensure that such claims are sufficiently ripe for adjudication.

First, property owners must demonstrate that the Government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Second, property owners must show that they sought compensation through the procedures the State has provided for doing so.

The application of these requirements by the lower Federal courts has wrecked havoc upon property owners whose takings claims are virtually never heard on the merits in Federal court.

Under these requirements, many property owners are forced to endure years of lengthy, expensive, and unnecessarily duplicative

litigation in State and Federal court in order to vindicate their constitutional rights.

The case of *Del Monte Dunes and Monterey Limited* v. *City of Monterey* provides a pertinent example. In that case landowners submitted a subdivision proposal in 1981 to build residential units on an ocean-front parcel in Monterey, California. The city denied the property owners a permit, but indicated that they would approve the plan if certain conditions were met. The property owners modified the proposal according to the city's conditions, but the city denied the permit anyway. This process went on for 5 years with 19 different site plans submitted by the owners, and five formal decisions by the city. The property owners eventually filed suit in the United States District Court for the Northern District of California, alleging that, among other things, the denial of the proposal by the city was an unconstitutional regulatory taking of their property without just compensation.

The district court held that the property owners' claim was not ripe for adjudication, however, because they had neither obtained a definite decision as to the development the city would allow, nor sought compensation in State court. The United States Court of Appeals for the Ninth Circuit reversed the district court, holding that the city's decision was ripe for review.

On remand to the district court, the owners' claims were finally submitted to a jury that awarded the landowners $1.45 million on February 17, 1995, 14 years after the landowners submitted their initial development plan to the city.

Property owners whose Federal takings claims are dismissed on ripeness grounds by Federal courts also face another procedural pitfall that results from being forced to litigate first in State court. Application of the doctrines of res judicata and collateral estoppel to bar Federal takings claims, is a procedural trap that operates as follows. The Federal courts will dismiss a property owner's takings claim because the property owner has not first litigated the claim in State court.

When the property owner returns to Federal court after litigating the State law claim in State court, the Federal court will hold that the Federal takings claim is barred because it could have been litigated in the State court proceedings. The effect of the reasoning of these cases is that many property owners have no opportunity to have their Federal constitutional claims heard in Federal court. Federal takings claims cannot be brought in Federal court until all State court remedies are exhausted. Federal takings claims cannot then be heard in Federal court because they could have been brought in State court. No other constitutional rights are treated in such a manner, and with such disregard.

In addition to the procedural hurdles outlined above, Federal courts have also invoked various abstention doctrines in order to avoid deciding the merits of takings claims. For example, the type of abstention provided for in the *Pullman* case allowed a Federal court to abstain from deciding a Federal question pending the resolution of an unsettled question of State law in State court, and numerous Federal courts have invoked that doctrine to avoid deciding property owners' takings claims. Similarly, the type of abstention provided for in the *Burford* case allows Federal courts to abstain

in cases involving complex State regulatory schemes, and Federal courts have also relied upon this doctrine to avoid the merits of property owners' taking claims.

The combined effect of all these procedural obstacles is that it is virtually impossible for property owners to vindicate their constitutional rights in Federal court.

According to one commentator, Federal courts avoided the merits of over 94 percent of all takings cases litigated between 1983 and 1988. Another recent study found that 81 percent of the takings claims raised in Federal court between 1990 and 1997 were never heard on their merits.

H.R. 2372 was designed to address the systematic subordination of property rights by clarifying and simplifying the procedures which govern property rights claims in Federal court.

In particular, H.R. 2372 clarifies, for purposes of the application of the ripeness doctrine, when a final decision has been made by the Government regarding the permissible uses of property. H.R. 2372 also removes the requirement that property owners litigate their takings claims in State court first, and prevents Federal judges from abstaining in cases that involve only Federal takings claims.

Similar legislation passed the House during the last Congress by a vote of 248 to 178. The constitutional basis for this legislation is found in Congress's well-established authority to regulate the practices and procedures in Federal courts. The ripeness requirements discussed above are not mandated by the Constitution; instead, as the Supreme Court decisions make clear, they are prudential procedural requirements created by the Court to avoid involving Federal courts in State land use disputes until the State has had an opportunity to remedy the injury it has inflicted upon the property owners. H.R. 2372 represents a valid exercise of Congressional authority over procedure in Federal courts to ensure that property rights are no longer treated as second class rights with, no meaningful Federal forum for their vindication.

[The bill, H.R. 2372, follows:]

106TH CONGRESS
1ST SESSION

H. R. 2372

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law; to prevent Federal courts from abstaining from exercising Federal jurisdiction in actions where no State law claim is alleged; to permit certification of unsettled State law questions that are essential to resolving Federal claims arising under the Constitution; and to clarify when government action is sufficiently final to ripen certain Federal claims arising under the Constitution.

IN THE HOUSE OF REPRESENTATIVES

JUNE 29, 1999

Mr. CANADY of Florida (for himself, Mr. FROST, Mr. DOOLEY of California, Mr. GOODE, Mr. BISHOP, Mr. DIAZ-BALART, Mr. WALSH, Mr. BARCIA, and Mr. BURTON of Indiana) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law; to prevent Federal courts from abstaining from exercising Federal jurisdiction in actions where no State law claim is alleged; to permit certification of unsettled State law questions that are essential to resolving Federal claims arising under the Constitution; and to clarify when government action is sufficiently final to ripen certain Federal claims arising under the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Rights Implementation Act of 1999".

SEC. 2. JURISDICTION IN CIVIL RIGHTS CASES.

Section 1343 of title 28, United States Code, is amended by adding at the end the following:

"(c) Whenever a district court exercises jurisdiction under subsection (a) in an action in which the operative facts concern the uses of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court in an action in which no claim of a violation of a State law, right, or privilege is alleged, if a parallel proceeding in State court arising out of the same operative facts as the district court proceeding is not pending.

"(d) If the district court has jurisdiction over an action under subsection (a) in which the operative facts concern the uses of real property and which cannot be decided without resolution of an unsettled question of State law, the district court may certify the question of State law to the highest appellate court of that State. After the State appellate court resolves the question certified to it, the district court shall proceed with resolving the merits. The district court shall not certify a question of State law under this subsection unless the question of State law—

"(1) will significantly affect the merits of the injured party's Federal claim; and

"(2) is patently unclear.

"(e)(1) Any claim or action brought under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) to redress the deprivation of a property right or privilege secured by the Constitution shall be ripe for adjudication by the district courts upon a final decision rendered by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, that causes actual and concrete injury to the party seeking redress.

"(2)(A) For purposes of this subsection, a final decision exists if—

"(i) any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken;

"(ii)(I) one meaningful application, as defined by the locality concerned within that State or territory, to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, in a case in which the applicable statute, ordinance, custom, or usage provides a mechanism for appeal to or waiver by an administrative agency; or

"(II) one meaningful application, as defined by the locality concerned within that State or territory, to use the property has been submitted but has not been approved, the disapproval explains in writing the use, density, or intensity of development of the property that would be approved, with any conditions therefor, and the party seeking redress has resubmitted another meaningful application taking into account the terms of the disapproval, except that—

"(aa) if no such reapplication is submitted, then a final decision shall not have been reached for purposes of this subsection, except as provided in subparagraph (B); and

"(bb) if the reapplication is not approved, or if the reapplication is not required under subparagraph (B), then a final decision exists for purposes of this subsection if the party seeking redress has applied for one appeal or waiver with respect to the disapproval, which has not been approved, in

a case in which the applicable statute, ordinance, custom, or usage provides a mechanism of appeal or waiver by an administrative agency; and

"(iii) in a case involving the uses of real property, if the applicable statute or ordinance provides for review of the case by elected officials, the party seeking redress has applied for but is denied such review.

"(B) The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (A) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the application or reapplication would be futile.

"(3) For purposes of this subsection, a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State or territory of the United States.

"(f) Nothing in subsection (c), (d), or (e) alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

SEC. 3. UNITED STATES AS DEFENDANT.

Section 1346 of title 28, United States Code, is amended by adding at the end the following:

"(h)(1) Any claim brought under subsection (a) that is founded upon a property right or privilege secured by the Constitution, but was allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress.

"(2) For purposes of this subsection, a final decision exists if—

"(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken; and

"(B) one meaningful application to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, in a case in which the applicable law of the United States provides a mechanism for appeal to or waiver by an administrative agency.

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if application or reapplication to use the property would be futile.

"(3) Nothing in this subsection alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

SEC. 4. JURISDICTION OF COURT OF Federal CLAIMS.

Section 1491(a) of title 28, United States Code, is amended by adding at the end the following:

"(3) Any claim brought under this subsection founded upon a property right or privilege secured by the Constitution, but allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress. For purposes of this paragraph, a final decision exists if—

"(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken; and

"(B) one meaningful application to use the property has been submitted but has not been approved, and the party seeking redress has applied for one appeal or waiver which has not been approved, in a case in which the applicable law of the United States provides a mechanism for appeal or waiver.

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if application or reapplication to use the property would be futile. Nothing in this paragraph alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

SEC. 5. DUTY OF NOTICE TO OWNERS.

Whenever a Federal agency takes an agency action limiting the use of private property that may be affected by the amendments made by this Act, the agency shall give notice to the owners of that property explaining their rights under such amendments and the procedures for obtaining any compensation that may be due to them under such amendments.

SEC. 6. EFFECTIVE DATE.

The amendments made by this Act shall apply to actions commenced on or after the date of the enactment of this Act.

○

I look forward to hearing from our witnesses today on this important legislation, and I now recognize the gentleman from North Carolina for his opening statement.

Mr. WATT. Thank you, Mr. Chairman.

I also look forward to hearing from the witnesses, and I'm trying to be open-minded about what gets said at the hearing, and try to form my opinions as we go. However, I would say that this bill seems to be pretty much a rehash of H.R. 1534 from the last Congress, and about that bill, I had some pretty serious reservations and voted against it. It seems to me to be yet another effort to inject the Federal Government into decisions that have traditionally been made at the local and State level. It seems to be somewhat of a pattern or our Subcommittee and Full Committee to give magnanimous lip service to States' rights, but not much practical application to States' rights when we disagree with the results that are obtained in taking cases.

It also seems to me that this bill would encourage forum shopping, which is another thing that we give lip service to discouraging, not supporting, and apparently don't adhere to well, philosophical principles when we get results that are unsatisfactory to us.

So, I'll be interested to hear the witnesses, and I'll try to reserve judgment until we've heard the arguments pro and con.

But I would be less than honest if I didn't express those initial reservations, among others, that I have about this proposal. I yield back in the interest of time, and in the interest of allowing these witnesses to give their testimony, and perhaps get out of town before the storm hits. [Laughter.]

Mr. CANADY. Thank you, Mr. Watt. I want to thank all the witnesses for being here today in this threatening weather.

Mr. Jenkins, do you have an opening statement?

Mr. JENKINS. I do not have one, Mr. Chairman.

Mr. CANADY. Thank you. So we'll now proceed with the introduction of our witnesses for this morning.

Our first witness this morning will be Richard Reahard of Bonita Springs, Florida. I extend a special welcome to you as my fellow Floridian.

Following Mr. Reahard will be Dick Goodwin an in-State developer and builder from Mt. Laurel, New Jersey. Mr. Goodwin's business has built more than 5,000 housing units, including low income HUD projects.

Our third witness is Joseph Barbieri, the Deputy Attorney General from the State of California. Mr. Barbieri obtained his undergraduate degree from Northwestern University and his law degree from the University of California.

The fourth witness is Diana Shea, the Associate Legislative Director for the National Association of Counties. Ms. Shea is also representing the National League of Cities.

Our final witness for today's hearing is Professor Daniel R. Mandelker, the Howard A. Stamper Professor of Law, Washington University School of Law in St. Louis, Missouri. Professor Mandelker's area of expertise is the law of zoning and land use planning.

Again, I thank all of you for being here today.

I would ask that you be very brief, and summarize your testimony in 5 minutes or less, and be guided by the light. When it's green, that means the 5 minutes have not yet expired. When it's red, 5 minutes have expired.

Without objection, your full written statements will be made a part of the permanent hearing record. I will say that I don't think that we're going to find anyone who will insist on strict adherence to the 5-minute rule, but your efforts to come as close to that as possible will be appreciated.

So, we'll begin now with Mr. Reahard.

STATEMENT OF RICHARD REAHARD, BONITA SPRINGS, FL

Mr. REAHARD. Thank you, Mr. Chairman. Representative Canady and other Members, I'd like to thank you all for having my wife Ann and I here to tell our story.

Now, just a brief summary of our written testimony. My mom and dad purchased a 560 acre parcel in 1944, and in 1956, after I completed my service in the Army, dad and I separated out 120 acres to become a residential subdivision called Imperial Shores.

Upon the death of my mom in November of 1984, title to the remaining property passed to Ann and I. Then, in December, 1984, Lee County implemented the Lee Comp Plan which rezoned our 40-acre, 127 block subdivision, worth at least $1.2 million, into a resource protection area, allowing one residence(s) on the 40 acres, worth now about $40,000.

We now began to jump through the hoops of administrative remedies provided for in the Lee Comp Plan; one, apply for a determination of error, rejected as not in error, rezoning was correct;

Two, apply for a plan amendment change from the resource protection area to urban community approved by the Zoning Board. But rejected by the Board of County Commissioners;

Three, apply for a determination of minimum use, rejected;

Four, apply for equitable estoppel, denied;

Five, apply for administrative determination of development rights. The County attorney concluded that we should be allowed four units on the 40 acres, but the County Commissioners rejected that opinion, and continued with the one unit for 40 acres.

We now believed the case was ripe for trial and filed in the 20th Circuit Court of the State of Florida in Lee County. Lee County had the case removed to Federal district court where it was tried in 1990.

The Magistrate ruled the case was ripe for trial, and a taking had occurred. He ordered a jury trial. The jury awarded $700,000.

Lee County appealed to the 11th Circuit Court of Appeals in Atlanta, and they first returned it to the lower court for review of the ripeness issue.

Ripeness was reaffirmed by the lower court, and then the 11th circuit court overruled the lower court and ordered the case returned to State court where it was first filed.

Now, after 10 years, back to square one and another 2 years of administrative and legal preparation, and the case is now tried in State court where originally filed.

Four trials and 12 years have now passed, and now Judge Pack rules in February, 1997, that a taking had occurred in 1984, and a jury set the value at $600,000, and, of course, Lee County appeals.

The appeals court affirmed the lower court ruling and the award, and finally the County is ready to negotiate and a settlement is reached at a cost to the taxpayers of Lee County of more than $2.2 million, instead of the $600,000 it could have been settled for in 1985.

Over the 13 years of this ordeal, many people supportive of us have contacted us. They have similar problems, but their properties are too small to justify the cost that we went through. I might also add that if we were a corporation, this would have no meaning, but we're individuals. When this began, I was 50 years old. When it was settled, I was 64. My wife and I have spent one-third of our adult life involved with this piece of property.

Once again, I wish to thank the Subcommittee for hearing our story, and we pray it will aid you and be of benefit to you in preparation of this legislation. Thank you.

[The prepared statement of Richard Reahard follows:]

PREPARED STATEMENT OF RICHARD REAHARD, BONITA SPRINGS, FL

My wife and I would like to thank you for having us here to tell our story to your subcommittee. We hope this Subcommittee will support H. R. 2372. If it passes, it will save property owners across our country from going through the ordeal my family has endured for most of the last fifteen years. First: a brief summary of the events leading up to the unconstitutional taking of our property.

My mom and dad purchased property in Lee County in 1944 and in 1956. After my discharge from the army, my dad and I separated out a parcel of about 120 acres to divide into single and multi-family homesites. The development continued until the mid-70's, as funds allowed.

In November 1984, when my mother died (my dad died in '72), the balance of the subdivision—about forty undeveloped acres—fell to my wife and me by inheritance.

Then on December 21,1984, Lee County implemented the Lee County Comprehensive Land Use Plan and rezoned our land as a resource protection area. This allowed only one home on the forty acres.

This in effect took all use of the land since previous zoning allowed for 126 residential units and a two-and-one-half acre marina site on the property.

Just prior to the downzoning, we had been offered 1.2 million dollars for our forty acres; after the downzoning, we had a 40 thousand-dollar undeveloped building site. At this point most citizens would believe that the constitutional protection of property as stated in the Fifth Amendment would provide that the local government would be required to pay for the taking. But they would be wrong, of course.

We then proceeded to follow the law as we had done since the beginning of the development and applied for a "determination of error" in the classification of the property as a resource protection area. After reviewing the application, Lee County informed us that there was no error. At that time we were advised that there was also no legal action we could take to resolve this issue; as a result of that advice we wrote to our county commissioner and offered to sell the property to Lee County for $600,000, half what we originally we had previously been offered.

Our commissioner, Mary Ann Wallace, did not respond to our offer. But then the Supreme Court ruled in the First English Case in California, and it seemed that there might be support for our case.

As a result we contacted Jeffrey Garvin of Garvin & Tripp, a law firm in Ft. Myers, Florida. After reviewing our case they consented to represent us.

We then began jumping through the administrative hoops in Florida's "Comp Plan Law"—a law created, in my opinion, to discourage the exercise of our constitutional rights.

We applied for a plan amendment from "resource protection area" to "urban community." The Lee County Planning and Zoning Commission recommended this change for approval. But it was denied by the County Board of Commissioners.

The next hoop was an Application for determination of Minimum Use. Denied! By now four-and-a-half years had passed since our property was rezoned. We jumped through the next hoop: we requested some undefined "equitable estoppel." Denied! (I still don't understand what it was). The next hoop was to request an administrative interpretation of a development right based upon the legal description. The county's attorney determined that we should be allowed to build four homes instead of one; but then the Board of Commissioners said he was wrong and reverted the zoning back to one unit on the forty acres—even though they had amended the "Lee Plan" to allow 2 units on 40 acres by this time.

At this point six years had passed, and we felt that enough was enough and the case should be ripe for trial. We filed it in the Twentieth Judicial Circuit Court of the State of Florida. During this time we had received no income from this property—only expenses—and we were required to continue to pay the property taxes (thousands of dollars we have never recovered, by the way).

After we filed the suit, Lee County removed the case from the state court to the Federal District Court where the trial was held in 1990. The Magistrate ruled in our favor, stating that the case was both ripe for trial and that a taking had occurred. A jury then awarded us $700,000 for our property.

Lee County appealed the decision to the 11th Circuit Court of Appeals, which delayed ruling on the case waiting for a ruling from the Supreme Court on the Lucas case out of South Carolina. When that ruling did not affect our case, the appeals court again dodged a ruling on the merits by ordering the District Court to review the ripeness issue.

The District Court reaffirmed its ruling that the case was ripe for trial. Lee County again appealed. Now this appeal was very interesting because, as you remember, it was Lee County's idea that we go to Federal Court in the first place. In other words, they argued that the Appelate Court should rule against their own decision to remove the case to Federal Court in the first place.

The appeals court agreed. This time they ruled against the lower court and ruled the case should never have been tried in Federal Court, but in the State Court were it was originally filed—where we wanted to try several years earlier.

Lee County had now held our property hostage for more than 10 years through the use of administrative mumbo-jumbo. After another 2 years of preparations (legal and administrative) the case was ready to be tried in State Court in Lee County.

The trial began on the 13th of February 1997 and ended on the 20th. Judge Pack ruled at the end of closing arguments that Lee County had in fact taken our property as we claimed in December 1984, and he ordered that a jury trial be held to determine the value of the property. The jury awarded us $600,000 and of course Lee County appealed.

The 2nd Circuit Court of Appeals heard the arguments on the 5th of January 1998 and ruled in our favor, affirming the lower court ruling on the 12th day of February 1998.

It was still necessary to negotiate with the County to resolve attorney's fees and other costs.

We finally settled for an amount that cost the TAXPAYERS of Lee County more than 2.2 million dollars—not counting the county's own legal fees. It should have been resolved in 1985 for $600,000—and would have been except for our current legal system which encourages local governments to misuse their power, knowing that judgment day for them is far in the future—if it comes at all.

But this case has cost our family much more that what the taxpayers of Lee County have paid. Our doctors have informed us that the stress we endured over the fourteen years resulted in physical and mental damage to both my wife and me. It has challenged our faith in the legal system and the integrity of our public officials. In the end, we still received less than the real value of our property.

But we have also seen great support. I would like to state for the record that we have received many calls over the years in support of our case from property owners whose parcels are too small to justify a lawsuit such as we experienced. They have

lost their property and will never receive any compensation for it under the existing laws because of the cost of the preparation for going to trial. They need their day in court, too.

We pray that our presence here and our story will help this Subcommittee to resolve this problem. Please support H. R. 2372 so that all property owners will be protected from the delays and injustices we have experienced. It is our opinion and belief that God created us and granted us freedom. The founding fathers recognized no one can be free without security in their right to ownership and use of property.

Thank you again for listening to our story.

Mr. CANADY. Thank you, Mr. Reahard.

Mr. Goodwin?

STATEMENT OF DICK GOODWIN, GOODWIN ENTERPRISES

Mr. GOODWIN. Thank you, Mr. Chairman and members of the Subcommittee for inviting me here today. Let me especially thank you, Mr. Chairman, for introducing this very important legislation.

As you mentioned before, I'm a real estate developer and builder from Mount Laurel, New Jersey. I own a business that was originally started by my father and brother with me in 1950. My company has built over 5,000 housing units, including low-income HUD projects.

Today, however, I work primarily as a land developer. In my professional capacity, I have acquired substantial experiences with those who regulate land use at every level of Government; local, State, and Federal. They are, for the most part, competent professionals who responsibly implement programs to protect our health, safety and environment.

I think we all recognize, however, the unequal bargaining position Government entities hold over private citizens. We have limited resources. They generally have fewer limits. In some circumstances, they can defer decisions and simply wear us out by forcing us through a maze of procedures. The cumulative effect of this sometimes causes a taking of private property without compensation. This is, of course, a violation of the fifth amendment to the Constitution.

Unfortunately, I can illustrate this point from my own experience. The story begins in 1989 when I attempted to develop 55 acres of land in Washington Township, New Jersey that I had owned prior to the enactment of the Federal Wetlands Act. The property is owned by myself 20 percent, and a charity in Israel that promotes peace between Israelis and Palestinians. They own 80 percent. They certainly could use this money. The property is oddly shaped in that it is one mile long and only two lots wide. The original application called for 86 lots even though the so-called local zoning ordinance would permit 110 lots.

We ran into a serious problem when we discovered that we had a few acres of wetlands at each end of the tract, five acres in all. Without filling these wetlands, we had no way to access the uplands which was in the middle of the tract. We filed with the New Jersey Department of Environmental Protection [DEP] for a mitigation permit. The DEP denied our application and instructed us to come up with another plan. We spent several years in a one-sided discussion with DEP, asking how we could alter our project to mitigate for the wetlands.

Keeping in mind it's a mile long and two blocks wide, no answer. We went through all the administrative requirements required by law and we appealed, ultimately appearing before a DEP administrative judge and he ruled that DEP properly denied our permit.

This seems like a clear taking of our property. We proceeded to State court with our takings claim. But once there, the State attorneys did not argue the merits of the case, they simply argued that we had not exhausted our administrative remedies, although we had no indication what they were talking about.

The Superior Court Judge agreed with the State attorneys. We asked the judge what remedies did we fail to exhaust. He simply stated, ask DEP, because they never told him either.

Of course, we had already asked DEP over and over again, and even made some suggestions about how we might redesign the project that would meet with their approval. Still no indication from DEP as to what they would accept. They had no time limits, nothing was required by law for them to act within a period of time.

We appealed to the appellate courts in New Jersey and they agreed with the lower court decision.

Now after 10 years of futile DEP and State court procedures, designed more to frustrate than to give us justice, we are considering going to Federal court. But I understand from my attorneys that the Federal courts are even less inclined to rule on the merits of private property rights.

The bill we are discussing today, H.R. 2372, addresses the hurdles, preventing me and many other property owners, small and large, from getting a resolution of our case on its merits.

We're asking for our day in court. We have not had it, and it is unlikely we'll get it. Most importantly, the bill clarifies when a final decision has occurred. In other words, at what point a property owner has exhausted all State remedies.

If the bill had been enacted when we started to develop our land in 1989, we could have had a ruling years ago saving us enormous amounts of time, money, and frustration.

Thank you.

[The prepared statement of Mr. Goodwin follows:]

PREPARED STATEMENT OF DICK GOODWIN, GOODWIN ENTERPRISES

Thank you Mr. Chairman and members of the subcommittee.

I am Richard Goodwin, a real estate developer and builder from Mount Laurel, New Jersey. I own a business started by my father and brother in 1950. My company has built over 5,000 housing units, including low-income HUD projects. Today, I work primarily as a land developer. In my professional capacity, I have acquired substantial experience with those who regulate land use at every level of government—local, state and federal. They are, for the most part, competent professionals who responsibly implement programs to protect our health, safety and environment.

I think we all recognize, however, the unequal bargaining position government entities hold over private citizens. We have limited resources. They, generally, have fewer limits. In some circumstances they can defer decisions and simply wear us out by forcing us through a maze of procedures. The cumulative effect of this sometimes causes a taking of private property without compensation. This is, of course, in violation of the Fifth Amendment to the Constitution.

Unfortunately, I can illustrate this point from my own experience. In 1988 I tried to develop a fifty-five acre tract in Washington, New Jersey, for myself and Neve Shalom—Wahat Al-Salem, a charity that promotes peace in the Mid-East and owns an eighty percent share of the property. The property is oddly shaped in that it is one mile long and only two lots wide. Our original application called for 86 lots on

the property, well within the original zoning plan. Access to the property is limited to either end, which mandated that our plan have a road running the length of the tract with lots along either side.

We ran into trouble when we discovered that we had a few acres of wetlands at each end of the tract, five acres in all. Without filling some of these wetlands we had no way to access the remaining acres in the middle of the tract. We turned to the New Jersey Department of Environmental Protection (DEP) for a mitigation permit. The DEP denied our application and instructed us to come up with another plan.

Given the constraints of our property, we were fairly limited in our options. At the time of our first application, DEP had strongly hinted that it would approve a project that had only 46 lots. As a result, we redrafted the project and submitted a plan calling for only 46 lots. But, despite the hints, DEP told us our changes would still not get us a permit.

We spent several years in a one-sided discussion with the DEP, asking how we could alter our project to mitigate for the wetlands. No answer. So we asked for a flat out denial—a ruling that in effect would state that because of the wetlands no development could occur on the property. Still, we heard nothing. We went through all the administrative requirements required by law to appeal—ultimately appearing before a DEP administrative judge. He ruled that DEP properly denied our permit. Given this ruling, we thought we had a final ruling and could proceed to state court with our takings claim.

But once we got to court, the state attorneys did not argue the merits of the case. They simply argued that we had not exhausted all our remedies, although we had no indication what those remedies might be. The judge agreed with DEP. We asked the judge "what remedy did we fail to exhaust?" He simply stated "ask DEP" because they never told him. Of course, we already had asked DEP and made many suggestions about how to draft a project they might approve. But we still had no indication from the DEP what might be acceptable. We appealed, but the appellate courts also agreed with DEP.

A little over a year ago, DEP hinted that it might approve a project with only fourteen lots. However, to gain access to these lots we would have to access them from a nearby, developed cul-de-sac. This suggestion, however, was ludicrous. As DEP knew, the cost of developing is significantly higher than the reasonable price we could sell the lots for. Moreover, we would be forced to attach a new cul-de-sac to an existing cul-de-sac—a plan that the Township had already rejected in a public hearing that DEP attended. In other words, the only suggestion DEP has made is one it knows is financially unfeasible and politically impossible.

Now, after ten futile years of state administrative and legal procedures, we are trying to go to federal court: after all, the DEP has violated my constitutional rights. But I am very afraid that the federal courts will also turn a deaf ear to our complaint. According to a study by Linowes and Blocher, over 80% of all compensation claims in federal district court never get a hearing on the merits. I know the study also shows that the average case requires almost 10 years to gain a hearing on the merits. Of course, in my case I have already spent ten years and have little hope of a hearing on the merits within the near future. Given these facts, there is little wonder regulators see few incentives to seek accommodations that will accomplish their policy purpose without unduly injuring individual property owners.

Meantime, our project in Washington, New Jersey, is left in suspended animation. We have no idea how to redesign the project or even what criteria to use in doing so. Moreover, we have no idea what remedies there are that we have not exhausted. I have come to believe that exhausting remedies means exhausting my bank account, exhausting my patience and exhausting my belief in the justice system.

As a real estate professional, I accept—indeed support—government's role in protecting our health and safety through a variety of land use and environmental measures. Further, I accept that government agencies can order the cessation of any activity thought to violate the laws and regulations intended to give us that protection.

But even as I accept the legitimacy of such regulations, I have experienced dramatic inequities and the need to guard against them. The current system does not provide such protection, even though the Fifth Amendment mandates it.

H.R. 2372 simply puts property owners on a level playing field with other individuals asserting constitutional rights. If a local police force breaks into my home without a search warrant, and I chose to go to federal court to allege that my Fourth Amendment rights have been violated, there would be no question that I could have the merits of my case heard. Would anyone argue that having Fourth Amendment rights protected in federal court forces local law enforcement decisions to be made

at the federal level? Does my right to go to federal court with that claim pose a threat to states' rights?

Supreme Court Justices William Brennan and Thurgood Marshall wrote in 1981 in the *San Diego Gas & Electric Company* v. *City of San Diego* dissenting opinion (which six years later became the majority view):

> *"Indeed, land-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. "After all, a policeman must know the Constitution, then why not a planner?"*

Indeed, why not all state officials?

If you will forgive my cynicism, I must say that the planners do indeed know the Constitution. That is precisely why the DEP has remained silent every time we have asked what remedies we have failed to exhaust. The DEP knows quite clearly that as long as it promises a new remedy for our situation but never delivers, the protections given us by the Constitution are simply words on a page. What's worse, I have observed a strong tendency among state courts to protect state bureaucrats.

H.R. 2372 is intended to reform the system so that citizens like me have some protection against the use of convoluted procedures to deny us our "day in court." This bill simply opens the door to the courts; it does not change the standards by which the courts will then consider the claim.

In allowing claimants their "day in court," H.R. 2372 in no way alters the standards that property owners must satisfy in order to qualify for compensation. Those who argue that simply by granting citizens timely access to the judiciary H.R. 2372 will increase takings payments implicitly admit that citizens' rights are currently being violated.

Under the current circumstances, why should we expect otherwise? What incentive exists to encourage sensitivity to the impacts on private property owners? If injured parties are denied timely access to the courts, where are the checks and balances to ensure equitable and efficient regulations?

Mr. Chairman, H.R. 2372 provides much needed balance to our system of regulating private property. It in no way diminishes government's ability to protect our health or safety; it changes no environmental program; it alters no land use or zoning authority.

H.R. 2372 simply assures that all of these legitimate functions are pursued equitably, so that all citizens share their costs and benefits.

Thank you, Mr. Chairman, for the opportunity to speak in support of H.R. 2372.

Mr. CANADY. Thank you very much.

Mr. Barbieri?

STATEMENT OF JOSEPH BARBIERI, DEPUTY ATTORNEY GENERAL OF CALIFORNIA

Mr. BARBIERI. Thank you, Mr. Chairman, members of the Subcommittee.

I'm speaking here today on behalf of the California Attorney General Bill Lockyer in opposition to H.R. 2372.

During the debate on H.R. 1534, 40 State attorneys general signed a letter in opposition to the bill, including California's Dan Lungren. This letter was typical of the broad bipartisan opposition that that legislation attracted and that this legislation is attracting.

The reason why there has been such broad bipartisan opposition is because this bill strikes at core principles involving the role of the Federal Government into affairs of State and local governments that are considered to be traditional State and local concerns, such as land use and such as real property. This bill offends those principles because it converts local land use disputes into Federal litigation and adversely affects the ability of local governments to engage in responsible land planning that will benefit all its citizens.

Now there's two key provisions that do this. First of course is the provision that lessens the requirements for establishing a final decision. Making that easier makes it easier to file a takings claim in Federal court.

Second, of course, it eliminates the requirement that applicants seek compensation in State court before coming to Federal court, thereby allowing applicants to bypass State courts altogether.

So it is no exaggeration to say that this bill will increase the amount of takings claims that are being filed and will increase their filing in Federal court.

This bill then is likely to have an adverse impact on local governments. First, of course, it will encourage premature litigation, which means we'll be going to court before the administrative process has truly played itself out.

Second, of course, is that it will give developers greater leverage in the land use process.

And what this will mean, of course, is that local governments faced with the threats of expensive Federal litigation will make decisions based on protection of their finances, rather than the decisions that best carry out the goals of the land use scheme.

I should say this is not an idle concern by local governments. We forget about the fact that there are small governments out there, governments with few people and limited resources, and it's not unusual, even in a State as big as California, for local governments to be located 100 miles or more away from Federal courthouses where they would have to employ expensive outside counsel if they wished to defend themselves against what are often meritless takings claims. So this prospect is a daunting prospect to local governments.

The question then is, is this Federal involvement in land use planning, is that necessary; has the case been made for it? Yes there are cases like Mr. Reahard that come up from time to time but cases like that represent a tiny fraction of all the land use decisions in this country. Moreover, there is no evidence that meritorious takings claims are being denied access to any of the courts. Finally, and perhaps more importantly, there is no evidence that the State courts are unable or unwilling to hear meritorious takings claims.

Putting aside these policy problems, there are a couple of other objections that the Subcommittee should consider. It's unclear whether this bill can even accomplish the goals it sets out to do. The finality doctrine has been portrayed as strictly a procedural hurdle that Federal courts have put up in order to avoid hearing takings cases. In fact, that requirement is integral to the establishment of a takings claim on the merits.

The United States Supreme Court has said that it is unable to adjudicate a takings claim unless it knows how far the regulation goes. It says it is impossible for us to do that. It says no answer is possible unless we know that. So the question is, can Congress, in the form of a procedural amendment, force the courts to decide an issue that they've said they cannot do.

Likewise, a similar issue arises with regard to the elimination of the requirement that applicants seek just compensation in State courts before coming to Federal court. As recently as the *Del Monte*

Dunes case, which was decided to last term, the Supreme Court has indicated that a violation of the takings clause involves more than just the taking of property. It involves the denial of just compensation.

So even if this Congress could enact a law that makes those takings claims ripe, what will happen is those takings claims will then be immediately dismissed on the merits for having failed to state an element of the cause of action, that is, that the applicant sought compensation and was denied by the State court.

There is no question that local procedures can always use room for improvement. But the answer for improving those procedures lies at the local and State level, and that is where the answer should be sought and not in this Congress.

Thank you.

[The prepared statement of Mr. Barbieri follows:]

PREPARED STATEMENT OF JOSEPH BARBIERI, DEPUTY ATTORNEY GENERAL OF CALIFORNIA

I appreciate this opportunity to testify on behalf of California Attorney General Bill Lockyer with regard to H.R. 2372, the Private Property Rights Implementation Act of 1999. The bill raises significant questions about the role of the federal government in matters of traditional state and local concern. Forty State Attorneys General, including former California Attorney General Dan Lungren, opposed H.R. 1534, the predecessor to H.R. 2372. Mr. Lockyer opposes H.R. 2372.

The broad, bipartisan opposition to H.R. 1534 and now H.R. 2372 is striking. For legislation that purports to be only about procedure, it has raised grave concerns among a variety of groups representing a broad range of public interests. These concerns are well-founded. H.R. 2373 violates basic principles of federalism and interferes with the ability of local governments to engage in responsible land use and environmental regulation. This federal interference into areas of traditional state and local concern is particularly unjustified because there is no proof of a significant problem that needs to be resolved.

The following discussion considers (1) why, as a matter of policy, H.R. 2372 represents an unnecessary federal intrusion into matters of state and local concern; (2) why, if enacted, H.R.2372 would fail to accomplish its objective of facilitating the determination of taking claims in federal court; and (3) why any improvements to the local regulatory process must be developed at the state and local level.

I. H.R. 2372 IS AN UNNECESSARY FEDERAL INTRUSION INTO STATE AND LOCAL ADMINISTRATION OF LAND USE AND REAL PROPERTY LAWS

H.R. 2372 Federalizes Local Land Disputes and Interferes With Local Land Use Regulation. H.R. 2372 represents a significant federal intrusion into state and local administration of real property and land use laws, which are areas that have always been recognized as matters of intrinsic state and local concern. See, e.g., *Lake Country Estates* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 402; *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 565 n.17 (1994). Although cast as legislation that eases procedural hurdles in federal court, H.R. 2372 will have a powerful impact on land use planning by local governments and will "federalize" many disputes that are now being worked out at the state or local level. The reasons why should be readily understood.

H.R. 2372 facilitates and encourages the filing of lawsuits in federal court. It does this in two primary ways. First, the bill provides that a taking claim brought under the Federal Civil Rights Act, 42 U.S.C., § 1983, shall be ripe for adjudication upon a final decision rendered by any person acting under color of state law that causes actual and concrete injury. The bill then goes on to define a "final decision," essentially providing that a final decision has been reached if the applicant has made one meaningful application and has applied for one appeal or waiver, unless (1) an appeal or waiver is unavailable (2) the governmental agency cannot provide the relief requested or (3) reapplication would be futile. Second, H.R. 2372 provides that persons may bring taking claims under section 1983 without first having sought compensation in state court. H.R. 2372 thus seeks to lessen or remove the barriers to taking claims found in cases such as *Williamson County Regional Planning Com.* v. *Hamilton Bank,* 473 U.S. 172, 194 (1985).

The existing procedural requirements tend to insure that disputes involving state and local planning issues will be decided in state courts. H.R. 2372 would cause more taking claims to be filed in general and would encourage them to be filed in federal court. The broadening of the final decision requirement would mean that more lawsuits may be filed because developers would no longer need to explore project alternatives in the manner required under existing law. The elimination of the requirement that a landowner first seek compensation in state court would mean that taking claims can be filed directly in federal courts. And because H.R. 2372's "final decision" test would only apply in federal court, developers would have a much greater incentive to file in federal courts. Thus, it is no exaggeration to say that H.R. 2372 will increase taking litigation and "federalize" local land use disputes.

This increase in taking claims in federal court will have serious impacts on the ability of local government to engage in responsible land use planning. The threat of having to defend against expensive federal litigation means greater leverage for the developer in the negotiating process. Greater leverage means that local governments, often small entities with limited resources, will be faced continually with a serious dilemma: they will be induced to approve potentially harmful development that they might otherwise have conditioned or denied, or they will be required to undertake the expense of substantial federal litigation. The costs of defending these lawsuits, in turn, will indirectly affect the amount of resources that local governments can devote to planning in the future.

But H.R. 2372 may adversely affect local land use planning in another way. If H.R. 2372 were to become law, developers would be more inclined to go through the motions of complying with the administrative process, doing little more than what would be needed to meet the new ripeness standards. The bill encourages this "take it or leave it" attitude, because it provides developers with less incentive to modify projects to gain approvals. This change in approach, in turn, may affect how local governments work with the regulated community. Rather than adopt conciliatory positions and seek to work with the developer, land use planners may be advised to make their record to avoid a taking and to remain tightlipped in their dealings with applicants when disagreements arise. The local land use process—a process far more amicable than its detractors ever seem willing to acknowledge—will be directed away from negotiation and compromise and towards posturing and gamesmanship.

Consequently, by facilitating the filing of taking claims, H.R. 2372 will cause major and undesirable changes in the way local land use planning is performed. Even if the case could be made that developers are entitled to more leverage in the local planning process, there is no reason that the federal government should be responsible for providing it. If change is necessary, the answer is insisting on greater accountability at the local level. If developers believe that local planners are the problem, they should demand that their governmental employers exert better control. And if they believe that local government officials are the problem, they should work to elect different ones. Federal intervention, however, is not the solution.

H.R. 2372 Is Unnecessary. Despite the urgency attached to the need for reform, the bill's proponents have failed to demonstrate that there is a problem that merits this extraordinary federal intervention into local affairs. The supporting "studies" point to the frequency with which federal judges dismiss claims as unripe and to the length of time that it takes to move disputes through the administrative and judicial process. One recent study chronicles the 79 cases decided in the federal courts during a nine-year period that would have been affected had H.R. 2372 become law. Delaney and Desiderio, "Who Will Clean Up the 'Ripeness Mess,'" The Urban Lawyer, Spring 1999, Vol. 31, No. 2. Even accepting its recitation of the cases at face value—although it is difficult to ignore that the authors do not attribute even a single minute of delay to any action taken by the developer—this study and those like it do not justify federal intervention.

First, the studies disregard that most federal litigation is time-consuming. Although land use cases are likely to persist longer than others because they require exhaustion of an administrative process as well as a legal one, it is likely that a general study of federal litigation would show a large lapse of time between the date that a cause of action first arose and the date that it is reduced to final judgment. Federal litigation is lengthy in an absolute sense, and increasing the number of cases that federal courts must hear, as H.R. 2372 is intended to do, is likely to make the problem worse, not better.

Second, the dearth of cases that would be affected by this legislation is noteworthy—approximately nine cases a year. This limited number of cases does not justify such a dramatic federal initiative. Nor is it a satisfactory response to say that many more lawsuits would be filed if H.R. 2372 were enacted. That simply confirms

the worse fears of H.R. 2372's opponents that H.R. 2372 will significantly encourage federal litigation and greatly expand the leverage of developers in the planning process.

Third, even assuming that there are nine federal cases a year that involve a lengthy administrative and judicial process, the information has no probative value. There are thousands of land use decisions made by local governments each year. Seizing upon these statistical outliers—the worst cases in a large sample—proves little.

Fourth, it appears that many of these cases were dismissed as unripe because the plaintiffs failed to exhaust state compensation procedures before filing their federal action. If lawyers and their clients continue to ignore the state compensation prong of *Williamson County* ten or more years after it was announced, is it fair to profess indignation when federal judges following existing precedent dismiss their taking claims for the failure to pursue state court remedies?

Finally, there is an even more serious shortcoming underlying these studies—the assumption that *meritorious* taking claims are being dismissed. For example, of the 79 cases in the previously mentioned study, only two appear to have resulted in a finding that a taking occurred. There is a good explanation for this. There is a common misconception that a federal taking claim is an appropriate remedy whenever a developer believes that government has overly restricted the use of property, diminished its value, or made a mistake during the permitting process. But the taking doctrine is not a federal tort act for disgruntled developers. "[I]t is well-established that 'not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense.'" *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 82 (1980), quoting *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960).

In fact, a taking claim is a very difficult thing to prove. Even in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court acknowledged that instances in which governments deny all economically viable use are "relatively rare" and occur in only "extraordinary circumstance[s]." See also *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (regulatory takings occur only under "extreme circumstances"). Moreover, local governments generally are scrupulous to avoid taking private property. Once the administrative process is followed to its conclusion, land use agencies rarely deny permits. Although there are disagreements over the scope of permissible development, only in the most unusual cases will government's restrictions on development amount to a taking. Thus, while critics of the California courts frequently complain that its appellate courts have never upheld a damages claim for a regulatory taking, the obvious response is that these claims are difficult to prove and that regulatory agencies take care to avoid unconstitutional restrictions of property. Takings are rare, and H.R. 2372, which purports to leave substantive taking doctrine intact, should do nothing to make proving a taking claim any easier.

Given the lack of empirical evidence that meritorious taking claims are being dismissed from federal courts, this controversial legislation at best would appear to do little more than allow a handful of litigants each year to lose their taking claims on the merits rather than on procedural grounds. Congress should not involve itself in these matters of intense local and state concern just so that unsuccessful litigants who chose to bypass state remedies may feel better for having had their day in federal court.

H.R. 2372 Promotes an Adversarial Relationship Between Government and Developers. H.R. 2372 is divisive legislation. It pits developers as adversaries against government, and demonstrates an implicit disrespect for federal courts, state courts and local governments. Reasonable minds may disagree whether the dual ripeness requirements announced in *Williamson County* are a good idea, and it is certainly fair to debate the wisdom of the policy. Lower federal courts, however, are bound to follow Williamson County. It does not advance the debate to characterize federal judges as condescending or motivated by concerns about their workload. E.g., Hearings Before the Subcommittee on Courts and Intellectual Property on H.R. 1534, 105th Cong., 1st Sess., p. 67 (testimony of Mandelker). It is ironic that this legislation, while seeking to make it more difficult for federal courts to dismiss cases on finality grounds, simultaneously encourages developers to bypass state courts and file more taking claims in federal court. This means that federal courts must adjudicate even more taking cases that, according to their detractors, they are unwilling to hear in the first place. More federal judges, not more cases, might be a better solution.

The bill's implicit criticism of federal judges makes its treatment of state courts even more inexplicable. There is no evidence that state courts are inhospitable to meritorious taking claims or that they subject litigants to needless or unjustifiable

delay. Indeed, given the failure of developers to prove their taking claims in federal court, a more thoughtful approach might encourage their resort to local forums to resolve what, after all, are essentially local disputes. Instead, by eliminating the state compensation exhaustion requirement, H.R. 2372 allows developers to bypass state courts. And, having relaxed finality standards in federal court, H.R. 2372 affirmatively encourages filings in federal court, as applicants seek to take advantage of relaxed procedural rules that would apply in federal courts alone.

As for local governments, little needs to be said in their defense. Local planners each day are asked to interpret complex zoning and land use plans and comply with state environmental disclosure laws, and then apply these laws and policies to sophisticated development schemes with a broad range of physical and social impacts. Local governments, in making their ultimate use determinations, must balance the command of the law and the wishes of the developer with the concerns of other public and private interests who may be affected by the project. Development projects often must undergo multiple levels of administrative review, which allows a project to receive the full attention it deserves by specialized decision makers, as well as afford developers an administrative recourse when they are displeased with the outcome.

It is inevitable that disagreements over policy and the interpretation of the law will occur during this process, and that those disagreements will add to the time and expense associated with it. While individual planners justifiably may be criticized in individual cases, the dissatisfaction of many developers about cost and delay may result from a general skepticism about the value of modern land use and environmental regulation, as well as a reluctance to accept that there is a reciprocity of benefits to be gained from the regulatory process. These larger concerns about the wisdom and administration of local land use laws and policies must, of course, be directed to state and local governments. Political and philosophical disputes about local land use matters are not a federal concern, and it is inappropriate for the federal government to intervene by facilitating federal lawsuits that will alter the balance in the local regulatory process.

H.R. 2372 Discriminates In Favor of Developers. Finally, this legislation has been fairly criticized for elevating the rights of developers above other deserving civil rights claimants. This criticism has been made frequently with regard to the abstention provisions of the bill, which restrict abstention in real property cases and not others. There are several other observations on this point.

Most land use disputes involving state and local governments currently are litigated in state courts. A garden-variety challenge to the legality of state and local regulatory action under state and local laws is heard in state court. *See, e. g.,* Cal. Code Civ. Proc., § 1094.5. Moreover, when third parties are dissatisfied with government action approving development projects, their remedies are almost exclusively under state law and in state court. See *id.* Although proponents of H.R. 2372 insist that developers who assert taking claims are necessarily entitled to present their claims in federal court, that is not necessarily the case. Under current law, taking claims against the States or their agencies must be filed in state court, see *Will* v. *Michigan* (1989) 491 U.S. 58, 71; even were H.R. 2372 enacted, this group of taking claims would remain relegated to state court. The requirement that persons alleging taking claims against local governments must first present their compensation claims in state courts makes them no worse off than their counterparts who allege that the State itself has engaged in a taking.

Therefore, most land use disputes involving state and local governments, many of which challenge the constitutionality of government action under the Fifth and Fourteenth Amendments, are now being resolved in state courts. There is no evidence that state courts are unable to resolve these disputes and there is no compelling reason why Congress must now federalize land use disputes for the group of dissatisfied developers unwilling to present their claims in state court.

The real issues involving modern land use regulation go far beyond those addressed in H.R. 2372, and any problems with the system must be addressed at the local level. Proponents of H.R. 2372 simply have not made the case that the federal government, in the guise of a procedural statute, should intercede on behalf of landowners in matters of almost exclusive state and local concern.

II. H.R. 2372 WOULD NOT CORRECT THE PROBLEM THAT IT PURPORTS TO SOLVE

The technical deficiencies of H.R. 2372 and its predecessor have been addressed by many of the legislation's opponents. To view these issues in a slightly different way, the following discussion considers how the federal courts might interpret H.R. 2372 should it become law. The conclusion is that H.R. 2372's attempted modification of the finality requirement and its elimination of the compensation requirement

would be ineffective, and that H.R. 2372 would create even more uncertainty in the law and frustration for those who support its enactment.

Existing Ripeness Doctrine. The Supreme Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer and Frates* v. *County of Yolo,* 477 U.S. 340, 351 (1986). There are two components of the ripeness doctrine. A landowner alleging a taking in federal court must show that (1) the government entity has issued a final and authoritative decision with regard to the application of its regulations to the proposed use of the landowner's property and (2) the landowner has requested compensation through state procedures. *Williamson County,* 473 U.S. at 194; see *MacDonald, Sommer and Frates,* 477 U.S. at 348. In order to establish that the agency has made its "final decision" for the purposes of the ripeness doctrine, the applicant must allege an initial rejection of a development proposal *and* that there has been a definitive action by the agency indicating with some specificity what level of development will be permitted on the property. (*MacDonald, Sommer and Frates,* 477 U.S. at 351; *Landmark Land Co.* v. *Buchanan,* 874 F.2d 717, 720 (10th Cir. 1989). To obtain the agency's definitive position, the applicant at a minimum must submit at least one formal development plan and, after its rejection, seek a variance or propose a less intense use. See, e.g., *Executive 100, Inc.* v. *Martin County,* 922 F.2d 1536, 1541 (11th Cir. 1991); *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo,* 841 F.2d 872, 876 (9th Cir. 1985), cert. denied, 488 U.S. 827 (1988). This has been referred to as the "*MacDonald* reapplication requirement." See *Town of Sunnyvale* v. *Mayhew,* 905 S.W.2d 234, 247 (Ct.App.Tex. 1994).

The Modification of the Finality Requirement Would Be Ineffective. Dissatisfied with these existing rules, the advocates of H.R. 2372 seek to obtain certainty through a mechanical test for determining when a taking claim is ripe. Presumably, a federal court would be required to decide a taking case on the merits if the landowner could demonstrate compliance with the test, regardless of how far along the administrative process had actually progressed.

Proponents of H.R. 2372 seriously underestimate the force of the ripeness doctrine. They perceive the doctrine as a procedural obstacle created by the courts to avoid deciding taking claims. By reducing the federal courts' discretion to determine finality, the argument goes, access to the federal courts will improve and many more taking claims will be decided. This view of finality misperceives the critical role that the ripeness doctrine plays in the adjudication of taking claims.

Finality in the context of a taking claim has two different but overlapping dimensions. First, it serves to define when a taking claim is ripe for adjudication. Second—and this is the aspect overlooked by H.R. 2372's adherents—it helps define whether a taking has in fact occurred. That is, there can be no injury and therefore, no taking, unless the government has taken final action. Furthermore, without a truly final decision, a court is simply not in a position to evaluate the nature of governmental action said to effect a taking.

This second dimension of finality is evident in the cases. Consider how the Supreme Court described the need for finality in *Williamson County:*

> "Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause . . . [The factors specified in the *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978)] *cannot be evaluated* until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County,* 473 U.S. at p. 191 (emphasis added).

Later, the Court said:

> "It is sufficient for our purposes to note that whether the "property" taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, *it is impossible to determine* the extent or the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations." *Williamson County,* 473 U.S. at 192 (emphasis added).

The Court made a similar observation in *MacDonald* when, in rejecting a taking claim as unripe, it stated:

> "It follows from the nature of a regulatory taking claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A *court cannot determine* whether a regulation has gone "too far" unless it knows how

far the regulation goes . . . *No answer is possible* until a court knows what use, if any may be made of the affected property." *MacDonald, Sommer and Frates,* 477 U.S. at 348, 350 (emphasis added).

It follows from this that there can be no constitutional injury unless there has been a final decision in this second, substantive sense. This point was illustrated in *Landgate* v. *California Coastal Commission,* 17 Cal.4th 1006 (1998). In that case the landowner contended that the Commission had taken his property because it denied a development permit for the construction of a house in the belief that the lot on which the development was proposed was illegally created. Even though the Commission's belief in the lot's illegality turned out to be mistaken, the Court found that the temporary delay occasioned by the Commission's erroneous decision did not constitute a taking. Treating the taking claim as ripe, the Court found no constitutional injury because the Commission's erroneous decision did not represent a truly final decision on the use of property: "The Commission could not be said to have reached a final and authoritative determination of the development on Landgate's lot until after the dispute about the legality of the lot had been resolved." *Id.* at 1010. There are other cases where taking claims have been denied on the merits where, due to a mistake in the regulatory process, the agency had not reached a truly final decision, even though the matter was considered ripe for review. E.g., *Tabb Lakes, Ltd.* v. *United States,* 10 F.3d 796, 803 (Fed.Cir.1993); *Smith* v. *Town of Wolfeboro,* 615 A.2d 1252 (N.H.1992).

The final decision requirement therefore is essential to determining whether a taking has occurred and whether there has been injury in fact. This has important implications for H.R. 2372 and explains why H.R. 2372's imposition of arbitrary standards for determining ripeness is unlikely to effect any significant change.

How might a federal court analyze such a taking claim under H.R. 2372's finality standards? There are two likely possibilities. First, a court may find that H.R. 2372 impermissibly dictates the manner in which the court must decide cases. See *Clark* v. *Valeo,* 559 F.2d 642, 650-651 n.11, aff'd, 431 U.S. 950 (1977) ("To the extent this language may be read as suggesting a view that Congress may 'command' the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed 'for its own governance in the cases confessedly within its jurisdiction' . . . we respectfully disagree," citing *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (Brandeis, J., concurring)). If the Supreme Court has said that "it is impossible" or a "cannot determine" whether a taking has occurred unless there has been a truly final decision that informs the court as to how far the regulation goes, it is questionable whether a court may be compelled to reach a decision on the merits by legislation that arbitrarily determines what constitutes a final decision. If "*no answer is possible,*" then no answer is possible, regardless of legislative insistence that the courts look for one. Moreover, a court in these circumstances might question whether H.R. 2372 impermissibly intruded on the judiciary's paramount authority to interpret the Constitution, at least to the extent that H.R. 2372 purports to redefine the manner in which a court must decide the merits of a constitutional taking claim.

Second, a court might construe H.R. 2372 narrowly and assume that there was no intent to dictate how the courts should analyze a taking claim. For the reasons already discussed, however, the court still would have to analyze whether an agency had rendered a truly final decision to determine the impact of government's regulations and whether a taking has occurred. This will lead to the very same outcome as under existing law—the developer will fail to establish a taking claim because he or she would fail to show how far the agency's regulations went. If, for example, a developer claimed that an agency's decision to deny a 100-unit subdivision effected a taking but failed to explore other alternatives for project approval, a court would have no way of ascertaining whether the agency's action constituted a taking without knowing whether the agency would have approved some lesser development. If this information would have been required under the old *Williamson County/MacDonald* standards—and the Court tells us that the nature of the inquiry demands it, see *Williamson County,* 473 U.S. at p. 191—the taking claim would fail even if the action were deemed "ripe."

The Elimination of the Compensation Requirement Would Be Ineffective. H.R. 2372 also attempts to modify existing ripeness standards by eliminating the second prong of *Williamson County* which requires that taking claimants demonstrate that they have unsuccessfully attempted to obtain compensation using state procedures. The constitutional issues raise by the elimination of this requirement was the subject of much discussion with regard to H.R. 1534. As critics have pointed out, eliminating the procedural hurdle does not solve the problem because the compensation re-

quirement is an element of a cause of action for an uncompensated taking. The Court stated in *Williamson County:*

> "If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation . . . [B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a section 1983 action." *Williamson County,* 473 U.S. at 195, 195 n. 13.

Were H.R. 2372 enacted, a court likely would view efforts to eliminate the *Williamson County* compensation requirement in one of two ways. First, it might interpret the provision as an effort to redefine substantive elements of the taking doctrine and declare it an unconstitutional encroachment on judicial authority to interpret the constitution. Or, it could view the provision as procedural only, but dismiss the taking claim on the merits for having failed to state one of the necessary elements of a taking claim. Either way, H.R. 2372 would not accomplish its objective.

It is also likely that a court would reject any claim that the second prong of *Williamson County* was dicta. The Supreme Court itself has frequently reaffirmed *Williamson County* on this point, *Suitum* v. *Tahoe Regional Planning Agency,* 520 U.S. 725, 733-734; *Presault* v. *ICC,* (1990) 494 U.S. 1, 11 (1990); *MacDonald, Sommer and Frates,* 477 U.S. at 350, and numerous lower federal courts have enforced the requirement. In any event, the Supreme Court's recent decision in *City of Monterey* v. *Del Monte Dunes,* Ltd., 119 S. Ct. 1624 (1999) should end the discussion. There, in its consideration of a right to a jury trial, the Court reaffirmed the rule in *Williamson County* that the denial of compensation is an element of a taking claim and that, unequivocally, a "federal court cannot entertain a taking claim under section 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *Del Monte Dunes, Ltd.,* 119 S.Ct. at 1642-44.

H.R. 2372 Would Create More Uncertainty in the Law. Proponents of H.R. 2372 argue that its ripeness provisions are necessary to promote certainty in the law. It is undoubtedly true—as would be the case for any legal doctrine that has been interpreted by hundreds of courts—that courts have not uniformly interpreted the doctrine. The perceived uncertainty in the application of the ripeness doctrine, however, is inherent in the nature of the taking doctrine itself. Because the taking doctrine itself is the product of "essentially ad hoc, factual inquiries," *Lucas,* 505 U.S. at 1015, citing *Penn Central Transp. Co.,* 438 U.S. at 124, it is not surprising that the ripeness element of the taking doctrine has developed in much the same fashion.

H.R. 2372 in any event would not afford the certainty promoted by its supporters. As just discussed, serious constitutional issues have been raised regarding the authority to legislate when a decision becomes final and to dispense with the compensation requirement. It is easy to foresee a variety of approaches among the federal circuits as they labor to discern the legality of this legislation, and there is little doubt that the Supreme Court itself ultimately would need to resolve these issues. Until H.R. 2372's legality is finally resolved, developers filing takings claims in federal court would have little assurance that they could rely on H.R. 2372's revision of the ripeness doctrine, and would face even further delays if they guess wrong.

Moreover, ignoring its potential constitutional deficiencies, the language of H.R. 2372 contains a number of interpretive problems that will lead to further uncertainty. As one example, section (e)(2)(A)(i) of H.R. 2372 requires that applicants obtain a "definitive" decision, in addition to following the other administrative steps for obtaining a final decision in subsections (A)(ii) and (A)(iii). "Definitive," however, is not defined. In *Williamson County,* the Court used the term "definitive" interchangeably with "final." *Williamson County,* 473 U.S. at 191, 192. Thus, the reference to a "definitive" decision in section (e)(2)(A)(i) could be read as importing the very judicial finality standards that the bill tries to avoid in sections (A)(ii) and (A)(iii). This may not be the drafters' intent, but it leaves uncertain exactly what "definitive" means.

As another example, section (e)(3) provides that "For purposes of this subsection, a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State or territory of the United States." This is the provision of the bill that is designed to eliminate *Williamson County's* compensation requirement. As drafted, however, the provision pertains only to the definition of a "final decision." Obtaining a "final decision" satisfies only the first prong of *Williamson County;* the need for exhausting state compensation procedures is separate and independent from the final decision requirement. On its face, therefore, section

(a)(3) accomplishes nothing: the final decision requirement of *Williamson County* never required that applicants needed to pursue their compensation remedy in order to obtain a final decision. Again, this may not be the drafters' intent, but it creates further uncertainty about the bill's meaning.

Other concerns about ambiguities in the language of H.R. 2372 previously have been raised. The bill excuses the need to seek a waiver or appeal if "it cannot provide the relief requested." This phrase might be read to excuse a waiver if the developer asserts the need for monetary relief (because agencies ordinarily have no power to grant relief), or if the developer seeks some other extreme relief outside the scope of what the agency is authorized to provide. Similar concerns have been raised about the use of the word "infringed" in section (e)(2)(A)(i) and the phrase "taking into account" in section (e)(2)(A)(ii).

In summary, H.R. 2372 would not cure any of the perceived problems with the regulatory system or the access of landowners to the federal courts. Instead, it would create more uncertainty and more unproductive, protracted and expensive litigation.

III. ANY CHANGE TO THE REGULATORY PROCESS OF LOCAL GOVERNMENTS MUST OCCUR AT THE STATE AND LOCAL LEVEL

Given the complexity of modern life, it is inevitable that there will be "horror stories" of individual experience with the courts or the regulators. These stories are unfortunate but understandable. Sophisticated land use and environmental regulation is necessary to insure the orderly use of land and resources and to minimize human impact on a fragile environment. Moreover, the overburdened judicial process is lengthy, especially where it becomes necessary to employ the appellate process. And, because human beings of varying degrees of competence and diligence administer these systems, the results sometimes will be uneven.

Even when the system works efficiently, the combination of both the administrative and judicial processes will be time-consuming. Difficult issues of interpretation often arise, and they frequently require that courts send the affected parties back through the regulatory process or through further trial court proceedings before a matter can be finally resolved. Few people enjoy being caught in the middle of this, but sometimes this is the way law is made and clarified for the next group with similar problems.

When compared to the many thousands of land use decisions made every year and the typical length of time that the judicial process requires, the stories of extreme delay are isolated. There is no evidence that the land use system does not work reasonably well or that it has failed to improve the quality of life. Nevertheless, government needs to remain aware that its actions affect the lives of real people and to minimize, where reasonably possible, the time and inconvenience of going through the process. But there is no justification for a federal response to remedy these relatively few cases, especially where H.R. 2372 is unlikely to work as intended and where federal interference would alter the land use process by upsetting the existing balance between government and the regulated community.

If changes need to be made, they must be made at the state and local level. In California, many changes to expedite the administrative and judicial process have already been made. The Permit Streamlining Act, Cal. Gov. Code §§ 65920 et seq., requires that agencies decide the completeness of applications and approve or disapprove projects within specified time limits, or else risk that the application will be deemed approved by operation of law. The California Coastal Act requires that hearings be conducted within 49 days of the filing of an application, Cal. Pub. Resources Code § 30621, and, to keep the process moving, provides that any legal challenges be brought within 60 days after the Coastal Commission's decision, *id.*, § 30601. The Coastal Act also forbids the taking of property, *id.*, § 30010, and gives the Commission the flexibility to prevent a taking in situations where strict application of its substantive policies might have resulted in the denial of all economically viable use.

The California judicial system also promotes expeditious decision making. It requires that all judicial decisions, including appellate decisions, be made 90 days after argument. The California system also provides for rapid review of administrative decisions under its procedure for administrative mandamus. Cal. Code Civ. Proc, § 1094.5. Mandamus actions are conducted on an administrative record and often are heard on the court's law and motion calendar. In one recent case, for example, a party filed an action in April 1999 challenging the Coastal Commission's appellate authority. The Commission staff rapidly assembled a 21-volume administrative record and the parties agreed to an expedited briefing schedule. The matter was heard on the merits on August 25, 1999, and the trial court issued its judgment

clarifying the manner in which the Commission should exercise its appellate jurisdiction. The Commission then rescheduled the matter for final disposition at its September 1999 meeting.

Much has been done and still can be done to streamline the administrative and judicial process. The impetus for change, however, must be directed at the state and local level. H.R. 2372 only tinkers at the margins of the perceived problems. This federal intrusion into local land use administration is unjustified and diverts attention from theareas where this much time and energy would be better spent.

CONCLUSION

H.R. 2372 offends principles of federalism because it injects the federal courts into resolving local land use disputes, matters of traditional state and local concern that typically are resolved in state courts. H.R. 2372 also upsets the balance between local governments and landowners by facilitating lawsuits and the threats of lawsuits by disappointed developers. It will change the dynamics of the land use process by encouraging both developers and government to act with litigation in mind, rather than promoting conciliation and compromise in the regulatory process. The need for this divisive federal incursion into local affairs remains unproven, justified as it is by inconclusive evidence from a tiny fraction of all land use decisions in this country. Moreover, the "procedural" problems that H.R. 2372 purports to correct are linked to the very core of the taking doctrine, a constitutional matter within the province of the courts. This legislation would create even more uncertainty than is believed to exist in the present system.

For these reasons, the California Attorney General strongly opposes H.R. 2372. Thank you for the consideration of our views.

Mr. CANADY. Thank you, Mr. Barbieri.

Ms. Shea?

STATEMENT OF DIANE S. SHEA, ASSOCIATE LEGISLATIVE DIRECTOR, NATIONAL ASSOCIATION OF COUNTIES AND NATIONAL LEAGUE OF CITIES

Ms. SHEA. Thank you, Mr. Chairman.

I am here representing NACo and the National League of Cities. We represent over 90 percent of the local governments of this nation.

We strenuously object to H.R. 2372 and we hope this Subcommittee will, after consideration, reject the proposal. Local governments adopt ordinances and approve building permits not for the purpose of infringing on property rights but rather for the opposite reason; to protect the property rights of all. Given the difficult situations with which they are faced, some of which you've heard today, it's remarkable how successful they actually are at resolving many of these difficult situations and reaching an accommodation.

NACo and NLC are frankly disappointed and surprised that the Congress would seriously consider legislation that is so obviously offensive to our system of federalism in this country. We've worked with Congress over the past several years to bolster the concept of federalism with great success, but this proposed legislation goes in completely the opposite direction.

As has been mentioned, land use is a local matter. It has never been regarded as an appropriate subject for Federal interference, but Federal interference is exactly what this legislation would accomplish. It would represent a completely unprecedented intrusion by Congress into a function that is traditionally reserved exclusive to States and local governments. It would impose significant new unfunded Federal mandates on local governments by imposing higher legal fees and it would give large developers and special interests a club or a hammer with which to intimidate communities

that cannot afford to put up a fight in Federal court. It's frankly difficult for us to conceive of a legislative proposal less worthy of Congress' attention than this one.

This bill's bypass of local procedures and State courts will have a number of serious adverse consequences for local governments.

First, as has been mentioned, it will result in more frequent and expensive litigation against counties, cities, towns, and townships. It is literally an invitation for developers to sue local communities early and often. It would force cities and counties to defend their challenges in distant courts, more expensive Federal courts. That would be an enormous financial burden.

To give you some perspective on this issue, consider the fact that there are 40,000 cities and towns in the United States, most of which have very small populations, few professional staff and minuscule budgets. Ninety-seven percent of the cities and towns in America have populations of under 10,000, and 52 percent have populations of under 1,000. Similarly, out of the 3,066 counties, 24 percent have populations of less than 10,000. Virtually without exception, these local governments have no full time legal staff. They are forced to hire outside legal counsel each time they are sued, imposing large and unexpected burdens on their budgets.

We have included in our testimony a couple of examples where situations like this have occurred. In Lincoln Township, Missouri, where a developer who wanted to put in a hog farm, a factory farm, sought damages of $8 million from a very small township. In fact, this township had only a couple hundred people.

In Hudson, Ohio, only 22,000 population, the city had to spend $250,000 to defeat an unfounded takings claim. That was the equivalent of a $35 per family surcharge on every family in the community.

So these are serious expenses for small governments. In a very real sense, this is an unfunded Federal mandate.

I hope someone is out there proposing that Congress reimburse local governments for the increased litigation costs should this bill pass, but we haven't heard anybody step up and volunteer to do that yet.

Second, the bill would provide developers greater leverage, as has been mentioned, over local land use planners, planning commissions and elected officials. We think some developers would use this additional clout to intimidate local officials. We would be forced to either approve their projects or put those kinds of litigation costs on our communities in order to protect the average property owner from some of the large developers of things like poorly-planned megamalls, factory farms or sprawl producing subdivisions.

Unfortunately, some developers who are exercising their alleged "rights" to build a landfill, a feed lot, may encroach on the property rights of others. There are always other sides to these stories that you don't necessarily hear about.

The local government is in the best position to weigh all the interests of the various parties and the community at large, not Federal judges, who are not close to the situation and who are not accountable to anyone.

NACo and the National League of Cities urge you not to upset the current balance between Federal, State, and local government.

H.R. 2372, we think, is a very radical bill designed to trample over common sense and fundamental issues of fairness, and we urge you to oppose it.

Thank you.

[The prepared statement of Ms. Shea follows:]

PREPARED STATEMENT OF DIANE S. SHEA, ASSOCIATE LEGISLATIVE DIRECTOR, NATIONAL ASSOCIATION OF COUNTIES AND NATIONAL LEAGUE OF CITIES

Introduction. Mr. Chairman, I am Diane S. Shea, Associate Legislative Director for Environment, Energy and Land Use for the National Association of Counties (NACo). I am appearing today on behalf of NACo and the National League of Cities (NLC), which together represent 90% of the local governments of this nation. NACo and NLC strenuously object to H.R. 2372, and urge the Congress to reject this proposal.

Local elected officials are dedicated to improving the livability of their communities through the equitable balancing of private property rights with the rights of the community at large. In good faith, local governments adopt ordinances and approve building permits, not for the purpose of infringing on property rights, but rather for the opposite reason—to protect the property rights of *all*. Often they have very difficult situations to handle, but given the potential for disagreement among competing interests, it's remarkable how successful they actually are in reaching an accommodation among the parties involved.

NACo and NLC are disappointed and surprised that the Congress would seriously consider legislation that is so obviously offensive to our system of federalism. Counties and cities across the country have worked with Congress in a variety of ways over the last several years to bolster the concept of federalism, for example, through the enactment of legislation to address the problem of unfunded mandates, and more recently, in developing legislation designed to limit federal preemption of state and local government actions. This proposed legislation goes in completely the opposite direction.

Land use is a local matter—it has been under the purview of state and local government since the beginning of the Republic. Planning and zoning questions are a central responsibility for local government boards and officials, and have never been regarded as an appropriate subject for federal interference. But federal interference with these traditional local government functions is exactly what this legislation would accomplish. The bill would seriously undermine our local zoning and land use authority. It would represent a completely unprecedented intrusion by Congress into a function traditionally reserved exclusively to state and local governments. It would impose significant new unfunded federal mandates by imposing higher legal fees on local governments. And it would give large land developers and special interests a "club" with which to intimidate communities that cannot afford to put up a fight in federal court. It is frankly difficult for us to conceive of a legislative proposal less worthy of Congress' attention.

Historical Precedent. The founding fathers of this nation never intended that federal courts be the place to settle disputes about zoning and land use regulations. In fact, the United States Supreme Court, in its decision of *Alden* v. *Maine* warns us of the dangers of skewing the balance of dual sovereignty in favor of federal government. As Justice Kennedy wrote, "When the Federal Government asserts authority over a state's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government" (*Alden* v. *Maine*, 67 U.S.L.W. at 4614, 1999).

Similarly, the Clinton Administration, following in the path of previous administrations, has issued an Executive Order No. 13132 entitled "Federalism", acknowledges the vital role of our federalist form of government by stating "Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people."

The Proposed Legislation. H.R. 1534 would change existing law regarding when local land issues are "ripe" for review in court, and in federal court in particular. It would promote litigation by a disgruntled property owner at the earliest possible moment by making a takings claim "ripe" for litigation if a local government rejects a development application or rezoning or variance request, even if the planning commission or elected body has not reached a final and definitive ruling on the matter.

In addition, the bill would overturn a key Supreme Court decision, *Williamson County Planning Comm'n* v. *Hamilton Bank of Johnson City,* 105 S.Ct. 3108 (1985), establishing the standards for determining when a regulatory taking claim is ripe to be heard in federal court. In that decision, the Court stated that, in order to present a ripe taking claim in federal court, a taking claimant must: (1) present a "final decision regarding the application of the regulations to the property at issue" from "the governmental entity charged with implementing the regulations"; and (2) demonstrate that the claimant requested "compensation through the procedures the State has provided for doing so." In other words, a property owner must first make every effort to resolve land use disputes through the local public hearing, review and appeals process before going into federal court. The proposed legislation would essentially eliminate both prongs of this established Supreme Court ripeness test.

H.R. 2372 will also prevent a federal court from exercising its traditional doctrine of abstaining from hearing a case concerning local land use issues when the court believes the case can more appropriately be resolved in state court. Removing the courts' discretion to abstain would preempt the state courts' traditional preeminence in local land use disputes, transfer significant control over these issues to federal courts, and entangle the courts in local policy matters. A federal judiciary, subject to no accountability for how the community will look or protects its people from undesirable land uses, is a frightening prospect to local elected officials.

The Bill's Likely Consequences. The bill's "by-pass" of local procedures and state courts will have a number of serious, adverse consequences for local governments.

First, the bill would result in more frequent, and more expensive, litigation against local governments. The bill is literally an invitation for developers to sue local communities early and often. By authorizing developers to short-circuit administrative procedures at the local level, the bill would mean that land use disputes end up in court at a far earlier point in the process. In addition, the bill would force counties and cities to defend their challenges in distant and more expensive federal courts.

The result would be an enormous financial burden on smaller communities in particular. To give you some perspective on this issue, consider the fact there are some 40,000 cities and towns in the United States, most of which have small populations, few professional staff, and miniscule budgets. Ninety-seven percent (97%) of the cities and towns in America have populations of less than 10,000 and fifty-two percent (52%) have populations less than 1000. Similarly, out of 3,066 counties, twenty-four percent (24%) have populations of less than 10,000. Virtually without exception, counties, cities and towns with populations under 10,000 have no full time legal staff. These small communities are forced to hire outside legal counsel each time they are sued, imposing large and unexpected burdens on small governmental budgets.

One example from Missouri illustrates the magnitude of the threat that takings litigation can pose for a smaller community. Several year's ago, the nation's fourth largest pork producer started operating a 50,000 hog farm in rural Lincoln Township, in Putnam County. The citizens of the town, who numbered only a few hundred, objected that the operations violated the township zoning ordinance. The company responded with lawsuit contending that the township's attempt to enforce its zoning represented a taking, and sought damages of $8,000,000. The proposed legislation would simply encourage the filing of more lawsuits of this type in the future.

In another case, the city of Hudson, Ohio, a fast-growing community of 22,000, had to spend $250,000 to defeat an unfounded takings claim. The city's plan to control their growth through an equitable allotment process for building permits—the product of three years of public hearings, study and review—was challenged as a takings action. The legal expenses to the city were the equivalent of a cost of $35 per household to defend this single case.

In a very real sense, this proposed legislation would represent yet one more unfunded mandate on local governments. Do the proponents of this legislation propose that Congress reimburse local governments for the increased litigation costs if this bill is enacted? Not that we are aware of.

Second, the proposed legislation would seriously undermine the ability of locally elected officials to protect public health and safety, safeguard the environment, and support the property values of all the residents of the community. By granting developers a number of significant new procedural advantages in land use litigation, the bill would provide developers and other claimants greater leverage to challenge local land use planning regulations. As a result of this bill, some developers would inevitably use their deep pocketbooks and threats of federal litigation to intimidate local officials. Local officials would be forced into the position of either having to approve their projects or face daunting legal expenses. Developers would have little incentive to resolve their disputes with the neighbors or negotiate for a reasonable

settlement outside the courtroom. In short, local governments would be unable to protect the average property owner against poorly planned mega-malls, factory farms, or the sprawl-producing subdivisions.

Local governments attempt to administer their land use laws to balance many different competing interests. For example, a developer exercising his alleged "right" to build a landfill or animal feedlot may encroach on the property rights of others in the vicinity. A factory owner that wants to build a plant next door to a day care center may not want to deal with the neighbors' concerns that the emissions may cause negative health impacts on the children. While these decisions are often complex and difficult, locally elected officials are in the best position to make these judgments. By contrast, the proposed legislation would tend to take these important community decisions away from the people's elected representatives who are closest to them, and transfer them to unelected federal judges.

Finally, the proposed legislation would circumvent the careful and open processes that have been established under state law to assure that other property owners have an opportunity to make their case, and that all the facts of the situation have been thoroughly examined. By-passing the local hearing and appeals process effectively undermines the ability of interested citizens to comment upon and influence land use decisions which are important to the future of their communities.

Further, by allowing a federal court action to be filed prematurely, the bill would make it difficult if not impossible for a plan commission, zoning board, or elected body to compile a complete record. In turn, courts would have incomplete information on which to make a fair decision.

Congressional Federalism Legislation. The bill before this Subcommittee would also contravene other efforts in this Congress to provide greater federal government accountability across the board. H.R. 2245, "The Federalism Act of 1999", a bill with bi-partisan support, is currently pending before this Congress. H.R. 2245 seeks to address the federal government's increasing predilection for preempting state and local laws by requiring Congress to fully explore the impacts of its federal actions. Congress would be required to issue federalism impact statements to assess the costs to state and local governments, and include state and local governments in the federal legislative process through early consultation procedures.

We cannot think of a more fitting example of why the federalism legislation is needed than the fact that H.R. 2372 is currently being considered by this Subcommittee. There has been no mandates impact study done for this bill. There has been no effort to sit down with local elected officials and demonstrate a compelling need for the United States Congress to interfere with one of the most traditional roles and responsibilities of communities in this country since its founding.

Conclusion. The National Association of Counties and the National League of Cities urge you not to upset the balance between the federal, state and local levels of government. H.R. 2372 is a radical bill, designed to trample over common sense and fundamental issues of fairness, and we urge you to oppose it.

Thank you for the opportunity to testify.

Mr. CANADY. Mr. Mandelker?

STATEMENT OF DANIEL R. MANDELKER, HOWARD A. STAMPER PROFESSOR OF LAW, WASHINGTON UNIVERSITY

Mr. MANDELKER. My name is Daniel R. Mandelker. I'm the Stamper Professor of Law at Washington University in St. Louis.

I thank you for the opportunity to testify on this bill today.

I want to make three points here.

The first is that there is even more reason today for a bill of this type than there was in the last Congress. Since that time, new surveys we have done have shown that the courts are even more effectively closed to litigants in takings cases than they were at the time the bill was introduced in the last Congress.

If I felt that the ripeness rules were working in a fair and evenhanded manner, I would not be testifying here in support of this bill today. But I am testifying in support of this bill because the ripeness rules are not working in a fair and evenhanded manner. They have effectively closed the Federal courthouse doors to liti-

gants in takings cases, and the stories you've heard today are often typical of what is happening.

I might point out incidentally that this bill is a jurisdictional bill, it is not a substantive bill, meaning this bill does not change takings law in any way at all. It simply redefines the jurisdiction of the Federal courts.

Secondly, I want to bring to the Committee's attention a case which is discussed in my testimony, a Supreme Court case, a city of Chicago case which held that, when municipalities are sued as defendants, they can remove the case to Federal court without any barrier of any kind at all.

Indeed, if the case has a takings claim in it, they can remove that takings claim to Federal court even though, had the plaintiffs sued directly in Federal court to try to assert that takings claim, that could not have happened.

We submit—and this case was decided since the last bill was considered—I would submit that this is grossly unfair as a matter of Federal practice.

Third, I want to talk about a matter that the Chairman alluded to briefly in his opening statement. What if a landowner or developer plaintiff does go to State court as he's told to do by the Federal Judge, and sues in State court? Recent cases, some of them since the time this bill or a bill similar to it was last considered, have held that, if the plaintiff goes to State court, and even if he or she reserves the Federal claim, they can't get back to Federal court to assert that Federal claim. So, there is a double-whammy in this situation. If a plaintiff does take the advice of the Federal Judge and does go back to State court to assert the takings claim, that plaintiff cannot, in what is becoming, I think, the prevailing rule, get back.

I submit that this is also unfair, and this would be cured by this bill as well. I want to comment finally on two other points that were made in testimony this morning, which I think are incorrect.

First of all, the statement has been made in testimony here today, and it's been made elsewhere, that this bill will somehow interfere with local land use planning and zoning.

Now, I submit that the interference, if any—and I don't call it that—is coming from the Federal Constitution. We're not talking about a Federal bill that interferes with local land use planning. We're talking about a Federal bill that simply gives litigants their day in Federal court to litigate under the Federal Constitution.

Finally, statements have been made that it is impossible to sue under the takings clause without first seeking compensation in State court, that this is somehow constitutional. Now, that's the rule of the Supreme Court today, and this bill changes that, but I submit that, to say that it is impossible to assert a takings claim until one seeks compensation, is turning the takings clause on its head. One has to establish a taking before compensation can be obtained.

Those are my comments in support of the bill, and I thank you for allowing me to testify here.

[The prepared statement of Daniel R. Mandelker follows:]

PREPARED STATEMENT OF DANIEL R. MANDELKER, HOWARD A. STAMPER PROFESSOR OF LAW, WASHINGTON UNIVERSITY

I am Daniel R. Mandelker, the Stamper Professor of Law at the University of Washington in St. Louis, Missouri. My area of expertise is the law of zoning and land use planning. I am the author of numerous articles in this area and have written 16 books on the topic. A copy of my *curriculum vitae* is attached. I am pleased to submit these comments on H.R. 2372, the Private Property Rights Implementation Act of 1999. I am here on my own behalf to support the bill. In offering this testimony I do not represent any interest group nor have I received any compensation, but the National Association of Home Builders has agreed to reimburse me for my travel and lodging expenses so I could appear here today. To prepare my submission I have reviewed, among other materials, the letter dated August 15, 1997, from Andrew Fois, Assistant Attorney General, United States Department of Justice, to Senator Patrick Leahy raising many policy concerns about H.R. 2372. I have also read the letter responding to the Department of Justice's criticisms, dated September 5, 1997, from John J. Delaney and Duane J. Desiderio of Linowes and Blocher LLP, to Mr. Fois. I have also read Messrs. Delaney's and Desiderio's article in Spring 1999 edition of The Urban Lawyer ("Who will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse"). Some of my testimony relies upon the Linowes and Blocher letter and the article, with which I concur.

My written testimony has two goals. First, I will explain why, in my opinion, H.R. 2372 is necessary to afford aggrieved landowners access to the federal courts when they suffer from unconstitutional government conduct. Second, I intend to explain what H.R. 2372 does, and does not, accomplish.

I. THE NEED FOR H.R. 2372

A. The Fifth Amendment Restricts the "Taking" of Private Property.

The Fifth Amendment prohibits the federal government from "taking" private property for public use unless the affected property owner is paid "just compensation." The restrictions of the takings clause apply to state and local governments through the Fourteenth Amendment.

The Constitution thus operates under the presumption that all levels of government can regulate private property for public purposes—such as zoning, environmental preservation, or any other reason to protect the safety, health and welfare of the community. However, in the words of Justice Holmes, sometimes government regulation for a public purpose goes "too far" and causes a taking. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922) (Holmes, J.) For this reason, one of the "principal purposes" of the takings clause is to prevent government" 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan* v. *California Coastal Comm'n,* 483 U.S. 825, 835 n.4 (1987) (quoting *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960)). Government regulation effects a taking, and requires the payment of just compensation, if it does not substantially advance a legitimate state interest or denies an owner economically viable use of his or her land. See *Agins* v. *City of Tiburon,* 447 U.S. 255, 260 (1980).

B. Ripeness Rules and the Fifth Amendment.

Before a property owner can bring a takings claim against a government body, he must satisfy certain rules established by the Supreme Court to ensure the case is "ripe." In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172 (1985), the Court announced a two-part ripeness test before a court can decide, on the merits, whether a regulation "goes too far" so as to require the payment of compensation. First, a land use agency must deliver a final decision "regarding how [a landowner] will be allowed to develop its property," that represents "definitive position . . . inflict[ing] an actual, concrete injury" upon the property owner. 473 U.S. at 191, 192. Second, a property owner must exhaust any compensation remedies under state law before litigating its federal constitutional claims in federal court. *Id.* at 194–95. In applying this two-part test, the Court has found takings claims unripe where a property owner did not: (1) submit initial development plans for approval in the first instance;[1] (2) submit to a process to obtain a

[1] *Agins* v. *Tiburon,* 447 U.S. 255, 260 (1980) (takings claim challenging zoning ordinance held unripe, because property owners had not yet submitted development plans).

permit that may allow development;[2] (3) apply for a variance or waiver from applicable land use regulations;[3] or (4) provide alternate or scaled-down development plans compared to an initial proposal.[4]

I agree that certain rules are necessary to determine when a takings claim is ripe for adjudication. However, the lower courts' applications of the Supreme Court's precedents are riddled with obfuscation and inconsistency. Indeed, "[t]he lack of uniformity among the [federal] circuits in dealing with zoning cases . . . is remarkable." *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) (substantive due process land use case). The ripeness opinions are in such disarray that federal judges and landowners need some objective criteria so that all parties know, up front, the point at which a government land use decision becomes final. I believe that H.R. 2372 goes a long way toward achieving that objective in a manner that is fair to both property owners and government officials.

C. The Lower Federal Courts' Rejection of their Duty to Resolve Cases Concerning Constitutionally-Protected Property Rights.

In my opinion, federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits. The circumstance is all-too-frequent that federal judges greet land use matters with an air of condescension—even though private property rights protected by the Fifth and Fourteenth Amendments are at stake.

When lower courts are asked to decide whether property is taken by final agency action without compensation, I disagree with the Ninth Circuit's assessment that they sit as "the Grand Mufti of local zoning boards." *Hoehne* v. *County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). I find it unconscionable that federal judges are predisposed to dismiss cases raising deprivations of constitutionally-protected property rights as "garden-variety zoning dispute[s] dressed up in the trappings of constitutional law." *Coniston Corp.* v. *Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988). This mind-set is causing a chilling effect to *dissuade* aggrieved citizens from seeking judicial redress, even though they have suffered at the hand of unconstitutional government conduct. One commentator notes that judges *avoided* the merits in *over 94%* of all takings cases litigated between 1983–1988. *See* Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions*, 10 J. LAND USE & ENVT'L L. 91, 92, n. 3 (1994). The case survey included by Messrs. Delaney and Desiderio in their article (*see* 31 The Urban Lawyer at 202–231 (Spring 1999)) has been provided to this Subcommittee. I have reviewed this survey, and note that 83% of the takings claims initially raised in the United States district courts, from 1990–1998, never reached the merits. For those property owners who commenced land use litigation in the federal trial courts and brought appeals therefrom during the same period, more than 64% saw their takings claims dismissed. Moreover, the survey notes that of the small portion of appellate cases where takings claims were found ripe and the merits reached, "*it took property owners, on the average, 9.6 years to have an appellate court reach its determination.* These landowners thus endured almost a decade of negotiation and litigation to obtain a judicial determination that their takings arguments could be heard on the merits." 31 The Urban Lawyer at 205 (emphasis in orginal).

The lower courts' condescension against constitutional land use matters "forget[s] that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.)

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[2] *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1011–13 (1992) (had a "special permit procedure" to the Coastal Council, for the purpose of determining permanent deprivations of viable land uses, been available to petitioner, he would have been required to pursue those avenues for a ripe takings claim).

[3] *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (court rejects facial challenge to Surface Mining Control and Reclamation Act, because "[t]here is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance . . . or a waiver . . . "; thus, takings claim "not ripe for judicial resolution"); *Williamson County*, 473 U.S. at 192 (1985) (takings claim not ripe because developer had not sought variances from zoning ordinance).

[4] *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 348 (1986) (property owners submitted only one subdivision proposal rejected by a zoning body; as alternative uses of the site existed other than the one proposed, the takings claim was unripe because the zoning body had not yet rendered "a final and authoritative determination of the type and intensity of development legally permitted on the subject property"); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 136–37 (1978) (property owners had not sought approval for any plan other than constructing a 50-foot office building above Grand Central Terminal; thus it was unclear whether the Landmarks Preservation Commission would deny approval for all uses).

H.R. 2372 would prevent federal judges from their persistent efforts to sacrifice the takings clause on the ripeness altar. The bill would curtail the nearly wholesale abdication of federal jurisdiction in lawsuits where issues are raised concerning the constitutional validity of land use regulation.

D. Abuses of the Ripeness Doctrine.

Land use agencies across the country have applied the ripeness requirement to frustrate as-applied takings claims in federal court. I was of counsel on an amicus curiae brief submitted by the American Planning Association (APA) in a ripeness takings case decided in the 1996–1997 term,[5] *Suitum* v. *Tahoe Regional Planning Agency,* 117 S.Ct. 1659 (1997). The brief supported the land use agency in this matter, but it also recognized that current ripeness rules:

> invite[ ] local government to create a more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officals can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use that the landowner never propsed. This is plainly infair and an abuse of [the ripeness requirement] . . .

Brief *Amicus Curiae* of the American Planning Association in Support of Respondent, *Suitum* v. *Tahoe Regional Planning Agency,* No. 96–243, at 13 ("APA Brief"). Examples of these sentiments, in the reported case law alone, are legion. The problem is especially serious because property owners may have neither the means nor stomach to litigate ripeness issues indefinitely. *See* Stein, *Regulatory Takings and Ripeness in Federal Courts,* 48 VAND. L. REV. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small").

Consider *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey,* 920 F.2d 1496 (9th Cir.), *on remand,* 95 F.3d 1422 (9th Cir.), *aff'd,* 119 S.Ct. 1624 (1999). In 1981, the property owners submitted a subdivision proposal to build 344 residential units. The plan was rejected, and city planners informed that a plan for 264 units would be reviewed favorably. The owners then submitted a plan for 264 units; city planners rejected it, and informed that a plan for 224 units would be reviewed favorably. The owners then submitted a plan for 224 units; city planners rejected it, and informed that a plan for 190 units would be reviewed favorably. The owners then submitted a plan for 190 units; city planners rejected it, and the owners appealed to the city council. The city council found the plan "conceptually satisfactory," and granted a conditional 18-month use permit to commence construction for the project. Subsequently, the developer worked with planning board staff to meet the city council's conditions for the 190-unit development. Staff recommended approval of the site plan, but the planning board overrode staff's recommendation and issued a denial. The property owners then appealed this decision to the city council, which this time denied the site plan for 190 units. Meanwhile, a sewer moratorium was imposed, a request to extend the special use permit was rejected, and the permit expired. The local officials thus expected the developer to start from square one. Following this Kafkaesque process, the federal district court dismissed a takings claim for lack of ripeness, but the appellate court then reversed. *See* 920 F.2d at 1502–1506; 119 S.Ct. at 1632. After 17 years of negotiation and litigation—and because the municipality permitted absolutely no use of the property at issue—the Supreme Court finally put an end to this case by upholding the lower court's award of just compensation to the land owner. It is significant that the Supreme Court recognized that takings plaintiffs have a *federal* constitutional right under the Seventh Amendment to a *federal* jury trial in a 5th Amendment property rights cases. 119 S.Ct. at 1637–1645.

Glendon Energy Co. v. *Borough of Glendon,* 836 F.Supp. 1109 (E.D. Pa. 1993), also merits discussion. There, after a local board rejected a development plan, the property owner purchased buffer lands so the applicable zoning could accommodate the proposed development. Subsequently, the county council met clandestinely in a "behind-closed-doors" executive session to re-zone the property and repeal the earlier provisions of the zoning ordinance that would have permitted the development. Nonetheless, the property owner was not able to get the federal court to address

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[5] However, the opinions expressed herein are my own. invite[ ] local government to create a more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of [the ripeness requirement] . . .

the merits of his federal constitutional grievances. Even though the property owner never had the opportunity to participate in the secret session, and even though the re-zoning was done for the specific purpose of preventing the development at issue, the court said the claims were unripe because the property owner never challenged the re-zoning's validity.

A California state case typifies the situation that landowners commonly confront when dealing with local officials. In *Healing* v. *California Coastal Comm'n*, 27 Cal Rptr. 758 (Ct. App. 1994), a state agency denied a permit for constructing a one-story, three-bedroom home, where it had not received a recommendation from a non-existent board as to whether the property should be restricted from development under a non-existent program for acquisition and set-asides of lots in the Santa Monica mountains. When the property owner sought compensation for a taking, the state argued that the claim was unripe. The court decided that the claim was, in fact, ripe, and acknowledged the abuses of the land use process inflicted upon the property owner:

> It is in the nature of our work that we see many virtuoso performances in the theaters of bureaucracy, but we confess a sort of perverse admiration for the Commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgment . . . to state the Coastal Commission's position is to demonstrate its absurdity.

Id. at 764.

It is my opinion that, based on the nature of the takings clause, property owners must first pursue some negotiation with land use officials to determine how far a regulation goes. However, I do not believe that ripeness barriers should be arbitrary, insurmountable or labyrinthine. I support H.R. 2372 because it would facilitate the negotiation process, while providing a more precise and just basis for determining when federal courts have jurisdiction in takings cases.

II. HOW THE BILL DEALS WITH THE "RIPENESS MESS."

I suggest that H.R. 2372 goes a long way to remedy the "ripeness mess" that currently precludes landowners from asserting constitutional takings claims in federal court. *See* Michael M. Berger, *The Ripeness Mess in Federal Courts, or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 7–1 (1991). Before I discuss specific provisions of the bill, I take this opportunity to bring some larger issues to the Subcommittee's attention.

A. No Change in Substantive Law. H.R. 2372's purpose is to establish avenues of access to federal courts in constitutional land use cases. It does *not* alter the substantive law of Fifth Amendment takings or any other constitutional provision. For example, some prior bills have specified that, if a land use regulation causes a reduction in property values by a certain arbitrary percentage (*i.e.*, 25%, 30%), then the landowner must be compensated. H.R. 2372 does nothing of this sort; it proposes strictly procedural reforms. The bill clarifies those circumstances in which property owners can obtain access to federal courts, so judges can perform their sworn task to interpret the Constitution and decide whether a land use regulation is a taking of property.

To make H.R. 2372's procedural remedy clear, the bill does *not* amend 42 U.S.C. § 1983—the statute creating a cause of action to remedy the unconstitutional conduct of those acting under "color of State law." Rather, H.R. 2372 proposes to amend the statutes conferring jurisdiction in the United States district courts and the Court of Federal Claims, for Section 1983 and takings claims against municipalities and the federal government.

B. Solely Federal Claims. The court access benefits conferred by H.R. 2372 would apply only when a landowner raises a *federal* claim in *federal* court. It would *not* cover situations where a property owner decides to litigate a state law claim concurrently with a federal one. Under this latter scenario, federal judges may utilize their traditional discretion to abstain from jurisdiction.

C. No Change in Sovereign Immunity Case Law. H.R. 2372 does not tamper with Section 1983 precedent regarding sovereign immunity. The Supreme Court has established that, while Section 1983 contemplates law suits against those acting "under color of State law," the Eleventh Amendment renders state officials, acting in their official capacities, immune from suit in federal court. *See Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). However, municipalities and counties are not immune from suit under Section 1983. *Owen* v. *City of Independence*, 445 U.S. 622, 636–37 (1980); *Monell* v. *Department of Social Servs.*, 436 U.S. 658–69 (1978). Consequently, H.R.

2372's procedural reforms would apply to landowners that bring suit against local governments for unconstitutional takings. In short, the bill does not alter the sovereign immunity law that has developed in the Section 1983 cases.

D. The Option of Court Access. In essence, the benefit of H.R. 2372 to property owners and to government agencies is simply to preserve a meaningful option of court access that can test the scope of the takings clause. Under the bill, when a landowner receives a final decision from a land use agency and pursues a waiver and/or appeal therefrom, she can either: (1) further negotiate with local officials or (2) sue. Based on the reality of the regulatory process, in my opinion the vast majority of landowners will opt for further negotiation and pursue less intensive land uses compared to their initial development applications. Developers do not hastily select litigation as their best opportunity to achieve the maximum profit expectations in their land. They would much rather spend funds to build their projects than pay legal fees.

If a property owner decides to litigate, H.R. 2372 by no means ensures that a taking will be found and compensation awarded; a plaintiff would still need to prove on the merits that a taking has occurred. This is a heavy burden indeed, and would likely require proof that the land use agency has denied all economically viable uses of the parcel at issue. *See, e.g, Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003 (1992). Considering this difficult evidentiary burden, it is doubtful that landowners will rashly opt to pursue litigation over further negotiation. Nonetheless, when a land use regulation may not permit the economically viable use of land, or when local decision-making procedures may require the submission of repetitive proposals, I submit that the jurisdictional requirements for resolving constitutional claims must be clarified. This is H.R. 2372's overriding purpose.

E. *No Fear of Crowding Federal Dockets.* I understand that concerns have been raised regarding the potential for H.R. 2372 to overload the federal courts with takings cases. I believe these fears are unfounded for several reasons. *First,* land use litigation already assumes an active position on the federal docket; however, the parties and the courts typically remain preoccupied with jurisdictional issues like ripeness. By specifying when a takings claim is ripe, H.R. 2372 could result in more efficient use of judicial resources, allowing litigants and judges to devote their attention to the merits.

Second, I do not think the bill would cause a rush of property owners into the federal court. Quite simply, the overwhelming disincentive to litigation is cost. This is especially true in the takings arena, where it is so hard to win on the merits. The primary objective of landowners, particularly those in the development business, is to realize their projects and make a profit. They will be far more inclined to negotiate with zoning officials rather than antagonize them with needless litigation. *Third,* I am not convinced that groundless prophecies of overwhelmed federal judges should excuse a citizen's right to litigate meritorious *federal* claims in *federal* court. Landowners should be secure in their right of access to a fair and impartial federal tribunal when their property has been taken in violation of the Fifth Amendment.

F. Clarify Ripeness Requirements for Other Constitutional Claims in Land Use Cases. In land use cases concerning constitutional rights, property owners often allege deprivations of procedural due process, substantive due process and equal protection, in addition to claims of taking without just compensation. The lower federal courts have utterly failed to agree on the ripeness requirements for claims other than a taking. Some of the federal courts proclaim that a ripe due process or equal protection claim is governed by the same two-part test from *Williamson County. See, e.g., River Park, Inc.* v. *City of Highland Park,* 23 F.3d 164 (7th Cir. 1994); *Acierno* v. *Mitchell,* 6 F.3d 970 (3d Cir. 1993). Other judges, however, rule that due process and equal protection claims are not subject to the ripeness requirement for a taking. *See, e.g., Smithfield Concerned Citizens for Fair Zoning* v. *Town of Smithfield,* 907 F.2d 239 (1st Cir. 1990); *Oberndorf* v. *City and County of Denver,* 900 F.2d 1434 (10th Cir.), *cert. denied,* 498 U.S. 485 (1990). Indeed, even the same circuit, in the same year, reached varying conclusions on the issue. *Compare Harris* v. *County of Riverside,* 904 F.2d 497, 500–501 (9th Cir. 1990) (procedural due process claim does not require the same ripeness requirements as a takings claim) *with Southern Pac. Transp. Co.* v. *City of Los Angeles,* 922 F.2d 498, 507 (9th Cir. 1990) ("[a]ll as-applied challenges to regulatory takings, whether based on the just compensation clause, the due process clause, or the equal protection clause, possess the same ripeness requirement . . . ").

I do not believe that ripeness standards should vary based on the type of constitutional claim a plaintiff makes in a land use controversy. I support H.R. 2372 because it would level the playing field for all constitutional claims asserted by property owners. The bill provides courts and litigants with the certainty that the same

ripeness requirements apply to claims arising under due process, equal protection, *and* takings clauses.

III. H.R. 2372 SECTION 2: SECTION 1983 ACTIONS

A. In General. Section 2 of H.R. 2372 would amend 28 U.S.C. § 1343 subsection (a)(3), the provision conferring original jurisdiction in the United States district courts over actions under Section 1983.

B. Abstention. Ripeness is not the only problem litigants face when they bring land use cases in federal courts. The opportunity for judges to abstain from hearing cases that raise state law questions creates additional barriers to federal jurisdiction. Federal courts may abstain from hearing a land use case when state law is not clear (*Pullman* abstention), when a state judicial proceeding is pending (*Younger* abstention), and when complex issues in state regulatory programs require interpretation (*Burford* abstention).

I am aware that some opponents have criticized the bill because they construe its abstention provisions as applying in *any* Section 1983 case, regardless of the alleged constitutional violation. However, this is not the intent of H.R. 2372. I believe that the Bill's text is clear when it states (my emphasis is underscored):

> "(c) Whenever a district court exercises jurisdiction under subsection (a) *in an action where the operative facts concern the uses of real property,* it shall not abstain from exercising or relinquish its jurisdiction to a State court where no claim of a violation of a State law, right, or privilege is alleged . . .

Abstention of jurisdiction can significantly delay the resolution of constitutional claims by federal courts. *See, e.g.,* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3–29 at 201 (2d ed. 1988) (abstention doctrine "imposes substantial costs [on litigants] through the delay of federal constitutional issues common where a definitive state court resolution of the state issues in the case must be obtained"). The Supreme Court has declared that "abstention from the exercise of federal jurisdiction is the exception, not the rule." *Hawaii Housing Auth.* v. *Midkiff,* 467 U.S. 229, 236 (1984) (citation omitted). Unfortunately, this rule has been turned on its head in the takings arena. Federal courts routinely dodge the merits of Fifth Amendment land use cases, and have invoked abstention doctrine to achieve this result.

I understand that the Department of Justice fears that H.R. 2372 would "radically shift" authority over local issues from state and local courts to federal courts because it will modify abstention rules. I disagree. Justice O'Connor recently wrote that the Supreme Court "has frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." *Idaho* v. *Coeur d'Alene Tribe of Idaho,* 117 S.Ct. 2028, 2045–46 (1997) (O'Connor, J, concurring). H.R. 2372 comports with this principle, and I do not believe it would work an injustice on abstention doctrine. The bill would simply ensure that aggrieved property owners, raising solely federal claims, have the right to have those claims resolved in federal court. Should a landowner decide to allege a claim of state constitutional, statutory, or common law pendent to the federal claim, H.R. 2372 would not apply.

In my opinion, the bill is carefully drafted to accommodate a property owner's right to access the federal courts with the historic discretion of federal judges to certify questions of state law, and with the basic constitutional precept recognizing state sovereignty. The following tabulation best portrays the situations in which H.R. 2372 would (and would not) apply, and depicts the bill's efforts to preserve a state court's right to resolve issues of state or local law:

NATURE OF LITIGATION	APPLICATION OF H.R. 2372
Property owner only alleges federal constitutional violations in federal court land use action.	H.R. 2372 would apply.
State law claim alleged pendent to federal claim in federal court.	H.R. 2372 would not apply. Federal judge has traditional discretion to accept or reject pendent state claim.
Property owner or public agency brings parallel proceeding in state court related to a simultaneous land use action in federal court (Younger abstention).	H.R. 2372 would not apply. If federal judge exercises traditional discretion and abstains, all claims must be litigated in state court.

NATURE OF LITIGATION	APPLICATION OF H.R. 2372
Federal claim rests on an unsettled issue of state law (Pullman abstention)	.H.R. 2372 would allow the federal judge to certify the question for state court interpretation.
Federal claim requires interpretation of complex state regulatory program (Burford abstention)	.H.R. 2372 would allow the federal judge to certify the question for state court interpretation.

The three branches of abstention relevant to H.R. 2372 are discussed below in more detail.

(1) Younger Abstention. H.R. 2372 avoids the problem of so-called *Younger* abstention. Under this branch of abstention, a federal court has the discretion to abstain from exercising its jurisdiction over federal claims (or relinquishing it altogether and dismissing the federal suit), where parallel state proceedings would apparently provide an adequate forum for airing the constitutional claims. *See Younger* v. *Harris,* 401 U.S. 37 (1971). While state courts have concurrent jurisdiction to decide Section 1983 cases, *see Felder* v. *Casey,* 487 U.S. 131, 139 (1988), my understanding is that *Younger* abstention is beyond H.R. 2372's scope because the bill does not contemplate institution of a parallel state proceeding. Nevertheless, the bill makes this clear as follows (my emphasis is underscored):

> "(c) Whenever a district court exercises jurisdiction under subsection (a) in an action where the operative facts concern the uses of real property, it shall not abstain from exercising or relinquishing its jurisdiction to a State court in an action where no claim of a violation of a State law, right, or privileged is alleged, *if a parallel proceeding in State court arising out of the same operative facts as the district court proceeding is not pending.*"

(2) Pullman Abstention. Federal courts sometimes abstain jurisdiction even in situations where a plaintiff asserts only federal claims. Under the doctrine of Pullman abstention, when a "federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Harris County Comm'rs Court* v. *Moore,* 420 U.S. 77, 83 (1975) (construing *Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941)). Federal courts have used *Pullman* abstention to avoid deciding land use controversies wherein property owners allege infringements of the United States Constitution. *See, e.g., Pearl Inv. Co.* v. *San Francisco,* 774 F.2d 1460, 1463–64 (9th Cir. 1986), *cert. denied,* 1476 U.S. 1170 (1986); *Bob's Home Serv., Inc.* v. *Warren County,* 755 F.2d 625, 628 (8th Cir. 1985).[6]

(3) Burford Abstention. Another branch of abstention calls for federal courts to avoid construing "complex" state regulatory programs. *See Burford* v. *un Oil Co.,* 319 U.S. 315 (1943). Federal judges have sometimes invoked *Burford* abstention to dodge the merits of land use matters, even though constitutionally-protected property rights are at stake. *See Front Royal & Warren County Indus. Park Corp.* v. *Town of Front Royal,* 945 F.2d 760, 764 (4th Cir 1991), *cert. denied,* 503 U.S. 937 (1992); *2BD Ltd. Partnership* v. *County of Commissioners for Queen Anne's County,* 896 F.Supp. 518 (D. Md. 1995).

C. The Supreme Court's College of Surgeons Opinion. With regard to the federal courts' obligation to invoke their jurisdiction over takings claims and refrain from abstention, the Subcommittee should consider the Supreme Court's decision in *City of Chicago* v. *International College of Surgeons,* 522 U.S. 156 (1997), and the Seventh Circuit's opinion on remand, 153 F.3d 356 (7th Cir. 1998).

In *College of Surgeons,* property owners filed both state law and federal takings claims against local officials over their application of a historic preservation ordinance in a manner that prohibited building demolition. The plaintiffs initially

[6] State law issues can potentially be relevant in the context of federal takings claims. *See, e.g., Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1025–27 (1992) (state nuisance law can define constitutionally-protected property interests); *Nollan* v. *California Coastal Comm'n,* 483 U.S. 825, 857 (1987) ("state law is the source of those strands that constitute a property owner's bundle of property rights"); *Broadwater Farms Joint Venture* v. *United States,* 35 Fed. Cl. 232, 240 (1996) (relying on *Lucas,* and recognizing that state law treats "each lot as a separate parcel for tax purposes"). At least theoretically, *Pullman* abstention could arise in the context of a federal takings claims if pertinent and crucial issues of state property law are "unsettled."

brought suit in state court; the municipal defendants then sought to remove the case to federal court, arguing that the federal court had original jurisdiction over the takings claim and supplemental jurisdiction over the state law claims.[7] Plaintiffs argued that the federal courts could not hear the case, but the Supreme Court disagreed.

> In her majority opinion Justice O'Connor concluded, "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts.[8] Moreover, Justice O'Connor sanctioned the ability of federal judges to delve into the underlying factual record that supports a particular local land use decision. The Court recognized that there is nothing in the United States Constitution or any federal statute to "suggest[ ] that district courts are without supplemental jurisdiction over claims seeking . . . review of local administrative determinations" based on a factual record.[9] Indeed, the vast majority of the Justices expressly *rejected* the suggestion that "federal courts can never review local administrative decisions.[10] In short, it is wholly appropriate for federal judges to review the conduct of local officials and ensure adherence to Fifth Amendment principles.

Delaney and Desiderio, 31 The Urban Lawyer at 199. Thus, the Supreme Court ruled that a case containing claims that local administrative action violate federal law, along with state law claims for on-the-record review of the local agency's administrative findings, can be removed to federal court by the municipality. *The basis for such removal is that the federal and state law claims could have been brought in federal court to begin with.* If a municipality can remove federal (and supplemental state) claims to federal court, then necessarily takings plaintiffs must be allowed to bring their claims in federal court from the start.

The Supreme Court then remanded for the lower court to determine if abstention was appropriate. The Seventh Circuit refused to abstain under any appropriate doctrine:

> The Seventh Circuit recognized that "the doctrine of abstention is 'an extraordinary remedy and narrow exception to the duty of a District Court to adjudicate a controversy properly before it' and may be invoked only in those 'exceptional circumstances' in which surrendering jurisdiction 'would clearly serve an important countervailing interest.[11] While the ordinance at issue "reflect[ed] important local policy concerns regarding the development and preservation of . . . real estate,[12] the Seventh Circuit easily found that the matter before it could be decided on the merits.

Delaney and Desiderio, 31 The Urban Lawyer at 200. To conclude the Seventh Circuit's treatment of *City of Chicago* on remand confirms H.R. 2372's "fundamental proposition that federal courts have an obligation to hear federal takings cases premised on the conduct of local officials." *Id.*

D. Certification of State Law Question. I favor the Bill's mechanism through which a federal court can certify an unsettled but significant question of state law to the highest appellate court of the pertinent state to assist in resolving whether a land use agency has violated the federal Constitution. Professor Tribe recognizes:

> Delay can be substantially diminished under a promising alternative to *Pullman* abstention, allowing the direct submission of state law question to an authoritative state tribunal, thereby removing the need to file a separate state action and speeding ultimate disposition of the case; a significant number of states have passed statutes allowing such certification. *See generally* Note, *Certification Statutes: Engineering a Solution to Pullman Abstention Delay, 59* NOTRE DAME L. REV. 1339 (1985); see also Field, The Abstention Doctrine Today, 125 U.PA.L. REV. 590, 605–09 (1977). TRIBE, supra, § 3–30 at 201 n. 18.

The bill's certification provision thus respects local decisionmaking processes in particular and state sovereignty in general, insofar as state courts are provided the opportunity to interpret matters of state and local law.

While certification can expedite resolution of a Section 1983 suit, I submit that the mechanism should not be blithely invoked to delay consideration of the merits.

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[7]The supplemental jurisdiction statute provides that "in any civil action of which the district courts have original jurisdiction, the[y] shall have supplemental jurisdiction over all other claims that . . . form part of the same case or controversy." 28 U.S.C. § 1367.

[8]*Id.* at 528–29.

[9]*Id.* 533.

[10]*Id.* at 532

[11]*City of Chicago*, 153 F.3d at 360.

[12]*Id. at* 362.

H.R. 2372 wisely proposes that a federal district court should not certify a question unless the state law issue will "significantly affect the merits of the injured party's federal claim." The apparent intent here is that only unsettled state questions *essential* for resolving the federal Section 1983 claim are susceptible for certification. The second check on certification is that the state law question must be patently unclear. The bill's text tracks the Supreme Court's sentiments in *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 236–37 (1984), and thus states that certification should not be permitted unless the state law question is "patently unclear."

H.R. 2372 would have no effect on state law certification procedures already in existence, nor would it create any certification mechanism. Accordingly, questions could not be certified to the highest appellate courts in those states that lack a certification procedure.[13] However, even in these jurisdictions, federal courts hearing diversity cases decide state law issues all of the time, so I do not believe that H.R. 2372 would undermine the authority of local officials or impair principles of federalism. For example, federal courts in states without formal certification procedures routinely interpret local statutes and ordinances to assess their constitutionality on the merits.[14] In any event, *federal* courts in these states are well-qualified to decide the ultimate issue of whether local officials have denied property owners *federal* constitutional rights.

E. Ripeness. As noted earlier (*supra* pp. 2–9), the ripeness rules spawned by *Williamson County* raise significant impediments to federal court resolution of takings claims on the merits. To reiterate, *Williamson County* requires two ripening elements for a takings claim: (1) a final agency decision on the application of the regulations at issue to the particular land in question; and (2) exhaustion of state court compensation remedies. H.R. 2372 addresses both prongs of *Williamson County*.

(1) Final Decision Prong. Proposed new Section 1343(e) provides that, when a claimant suffers an"actual and concrete injury" from a "definitive decision regarding the extent of permissible uses on the property that has allegedly been infringed or taken," the Fifth Amendment claim would be ripe. *Williamson County* is the patent inspiration for the proposed text. According to the Supreme Court, a takings challenge ripens when "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." 473 U.S. at 193. The bill further amplifies the "final decision" requirement in three respects, as discussed below: (a) on-site uses; (b) one meaningful application; and (c) futility.

(a) On-Site Uses. The first clarification, in proposed new Section 1343(e)(2)(A), states that a "final decision" exists when a person acting under color of State law "expresses a definitive decision regarding the extent of permissible uses *on the property* . . . without regard to any uses that may be permitted elsewhere" (emphasis supplied). I believe this language would simply confirm the recent holding in *Suitum* v. *Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997). The Court unanimously ruled that a property owner did not need to sell her transferable development rights ("TDRs") to yield a ripe takings claim, but never reached the merits of whether a taking had, in fact, occurred. TDRs, by definition, contemplate property uses *elsewhere*, apart from the subject parcel; they are rights that the owner of the regulated parcel can sell to another landowner to permit more intense development, that would not otherwise be allowed, on the property receiving the TDRs. For ripeness purposes only, H.R. 2372's intent is to make clear that a final decision regarding land uses *on* the property at issue is all that is required, without reference to

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[13] Research conducted during the summer of 1997 showed that 12 states lacked certification procedures at that time—namely, Arkansas, California, Illinois, Missouri, Nevada, New Jersey, North Carolina, Pennsylvania, Tennessee, Utah, Vermont, and Virginia.

[14] *See, e.g., Berry* v. *City of Little Rock*, 904 F.Supp. 940 (E.D. Ark. 1995) (interpreting city housing code ordinance); *Golden Gate Hotel Ass'n* v. *City and County of San Francisco*, 864 F.Supp. 917 (N.D. Cal. 1993) (city residential hotel ordinance); *Independent Coin Payphone Ass'n, Inc.* v. *City of Chicago*, 863 F.Supp. 744 (N.D. Ill. 1994) (city franchise and zoning ordinances); *Bender* v. *City of St. Ann*, 816 F.Supp. 1372 (E.D. Mo. 1993) (Missouri city's commercial sign ordinance); *Carpenter* v. *Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D. Nev. 1992) (zoning ordinance of California/Nevada compact agency); *Crow-New Jersey 32 Ltd. Partnership* v. *Township of Clinton*, 718 F.Supp. 378 (D.N.J. 1989) (New Jersey township's land use ordinance); *South Shell Inv.* v. *Town of Wrightsville Beach*, 703 F.Supp. 1192 (D.N.C. 1988) (North Carolina town's zoning ordinance); *Bloomsburg Landlords Ass'n* v. *Town of Bloomsburg*, 912 F.Supp. 790 (M.D. Pa. 1995) (Pennsylvania town's ordinance regulating rental units); *]Knights of the Klu Klux Klan* v. *Martin Luther King, Jr. Worshippers*, 735 F.Supp. 745 (M.D. Tenn. 1990) (local parade permit ordinance); *Katsos* v. *Salt Lake City Corporation*, 634 F.Supp. 100 (D. Ut. 1986) (airport authority ordinance); *Keleher* v. *New England Tel. & Tel. Co.*, 755 F.Supp. 117 (D. Vt. 1991) (ordinance of Vermont municipality); *Stuart Circle Parish* v. *Board of Zoning Appeals of the City of Richmond*, 946 F.Supp. 1225 (E.D. Va. 1996) (court would not avoid substantive interpretation of zoning code on abstention grounds).

development on other lands. The "on the property" language does not address the current debate in federal courts regarding whether, as a substantive matter, the relevant "denominator" in the takings fraction is the parcel as a whole or the portion of the tract burdened by land use regulation.[15]

(b) One Meaningful Application. Proposed new Section 1343(e)(2)(B) further clarifies the "final decision" requirement. In *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 348 (1986), a case involving denial of a single subdivision application, the Supreme Court decided that a takings claim is unripe without a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." Following this pronouncement, property owners aggrieved by government action have been plagued by the following question: How many proposals or applications must they submit to a land use body before a takings claim ripens?

For example, in *Southview Assocs.* v. *Bongartz*, 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993), the court decided a takings claim was not ripe because the landowner "did not attempt to modify the location of the units or otherwise seek to revise its application." The court failed to decide how many *reapplications* would be necessary to reach the merits. In *Schulze* v. *Milne*, 849 F.Supp. 708 (N.D. Cal. 1994), *aff'd in part, rev'd in part on other grounds*, 98 F.3d 1346 (9th Cir. 1996), property owners submitted a total of 13 revised plans over three years to renovate their home. Each time they submitted a plan "in compliance with all applicable zoning laws," local officials nonetheless "refused to approve the plan, and instead informed plaintiffs that there were additional requirements, not found in any zoning or other statutes, which plaintiffs had yet to meet." 849 F.Supp. at 709. *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 119 S.Ct. 1624 (1999), discussed earlier, typifies the conundrum that many property owners confront when they must submit application after application to obtain development approvals.

The bill would bring order to the chaos surrounding the reapplication requirement. H.R. 2372 uniformly calls for submission of one development application to a zoning body, and pursuit of one available waiver and/or appeal therefrom. I understand that this provision is intended to codify the body of cases requiring that a property owner make "one meaningful application" to the relevant land use decision-making body to ripen a constitutional claim.[16]It is interesting that the Ninth Circuit, a court typically sympathetic to local governments in constitutional land use cases, has pioneered the "one meaningful application" rule. *See* Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 ZONING AND PLANNING LAW REPORT 21–22 (March 1997).

I am aware that as this legislation moved through the House last Congress two additional requirements were added. Under applicable circumstances, an agency or board may provide, with the disapproval of an application, a written explanation that clarifies the use, density, or intensity of development of the property that would be approved, with any conditions that might also apply. The party seeking redress must resubmit another meaningful application taking into account the terms of the disapproval. Under these circumstances, only upon rejection of this further application (and pursuit of additional processes as outlined in the bill) has a final decision occurred.

In addition, if the applicable state statute or ordinance provides for review of the application by elected officials, a final agency decision has only occurred if the party seeking redress has also applied for but been denied by such officials in addition to the initial application and denial.

While I understand the purposes of these additions, I prefer that H.R. 2372's goal be to render a decision ripe after one meaningful development proposal is submitted to a land use agency, and a waiver or appeal is pursued from a denial of the application. As one commentator notes, "[t]he reapplication requirement forces a property owner to concede away portions of his or her constitutional rights in order to gain access to the federal courts." Gregory Overstreet, *supra*, 20 ZONING AND PLANNING L. REP. at 22. Any additional reapplication process forces property owners to bargain away valuable interests in the development of their land in order to get local approval. H.R. 2372 should remedy this problem by giving the landowner the option to pursue litigation after he has made one meaningful application to a land use

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[15] This substantive takings issue has yet to be decided by the Supreme Court. *See Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n. 7 (1992).

[16] See, e.g., *Eastern Minerals Int'l, Inc.* v. *United States*, 36 Fed. Cl. 541, 548 (1996) ("Each plaintiff must satisfy the threshold requirement of a single meaningful application" to yield a ripe takings claim); *Kawaoka* v. *City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.), *cert. denied*, 115 S.Ct. 193 (1994) (property owners must submit "one formal development plan"); *Unity Ventures* v. *Lake County*, 841 F.2d 770, 775 (7th Cir. 1988).

agency, without risking a tortuous process of re-submission, rejection, and more re-submission.

As I previously advocated:

> [T]he determination of when "enough is enough" [for ripeness purposes] should not be left for the local governments to decide. Rather, it should be for the landowner or developer who must weigh the risks of litigation versus another application proposal to decide whether in fact to contest the decision rendered after the first application.

APA Brief at 13. H.R. 2372 is consistent with this judgment. The bill preserves the option for property owners to choose federal court resolution of their constitutional grievances, rather than meander through an open-ended game of reapplication where land use officials play dual roles as both player and referee.

(c) Futility. The bill offers an additional gloss on the "one application" requirement: following Section 1343(e)(2)(B), the proposed text provides that a property owner need not make one application, or pursue a waiver/appeal therefrom, where "the prospects for success are reasonably unlikely and intervention by the district court is warranted to decide the merits." This provision would codify the so-called "futility" exception to ripeness. *See Gilbert* v. *City of Cambridge*, 932 F.2d 51, 61 n. 12 (1st Cir. 1991) (futility exception applies "where the degree of hardship that would be imposed by waiting for the permit process to run its course is so substantial and severe, and the prospects of obtaining the permit are so unlikely, that the property may be found to be meaningfully burdened and the controversy concrete enough to warrant immediate judicial intervention"); *Kinzli* v. *City of Santa Cruz*, 818 F.2d 1449, amended, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (takings claim ripened after plaintiff made one application and sought one variance and both were denied, because further reapplications would be futile).

In the *Suitum* case, I urged the Supreme Court to establish a futility exception similar to that proposed in H.R. 2372:

> It is respectfully submitted that the "futility" exception should *always* apply after one application has been made for a land use approval or administrative relief . . . [T]he finality requirement should be applied reasonably to recognize that a local government's position on the nature and intensity of development can be determined from factors other than repeated applications and denials.

APA Brief at 21. While I concur that the futility exception should be codified, it is significant that the language in H.R. 2372 only compels property owners to pursue available avenues for appeal and/or waiver. It is appropriate that H.R. 2372 rejects cases like *Shelter Creek Dev. Corp.* v. *Oxnard*, 1838 F.2d 375, 379 (9th Cir. 1988), which required an application for an *unavailable* variance to ripen a takings claim. I thus endorse the bill's text which provides:

> "The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (A) *if no such appeal or waiver is available, if it cannot provide the relief requested,* or if the application or reapplication would be futile."

(2) State Exhaustion Prong. The second prong of *Williamson County* requires claimants to exhaust available state compensation remedies before receiving a federal hearing on the merits of a taking. *Williamson County*, 473 U.S. at 194–95. In my opinion, however, a federal court charged with the responsibility of determining constitutional violations is as qualified as a state court to decide when the Fifth Amendment has been violated. Indeed, a federal court is better able to make this decision where, as in the scenario covered by H.R. 2372, a citizen asserts *solely* federal claims.

Santa Fe Village Venture v. *City of Albuquerque*, 914 F.Supp. 478 (D.N.M. 1995), illustrates the serious problems that occur when plaintiffs in takings cases must run the gauntlet between federal and state courts. In that case, the local city council established a building moratorium to preclude any development on lands near a national monument site. Plaintiff had an option to purchase land within areas subject to the moratorium, but never exercised that option because of the total land use restriction. Rather, it filed a lawsuit in federal district court seeking just compensation from the local government for its inability to develop the property. That *first* suit was dismissed on ripeness grounds, because the property owner never sought a compensation remedy in state court. In other words, exhausting state compensation procedures was necessary to make a federal claim ripe for resolution. The property owner then filed a *second* action for inverse condemnation in state court without raising any federal claims. The state court dismissed this complaint for lack of standing. After exhausting state proceedings, plaintiff then filed a *third* suit in fed-

eral court under Section 1983, alleging only deprivations of federal rights (including due process, equal protection, and takings). The United States District Court for the District of New Mexico then dismissed this *federal* action as unripe, because the *federal* claims were not raised in *state* court—even though the *state* court already decided that the property owner lacked standing to bring its action there.

In this regard it is important to consider the interplay between the state exhaustion prong for "compensation ripeness," and the concept of res judicata. Res judicata, or claim preclusion, provides that "a final judgment on the merits bars further claims by parties or their privies on the same cause of action." *United States* v. *Mendoza,* 464 U.S. 154, 158 n.3 (1984). This doctrine precludes parties from re-litigating claims "that were or *could have been raised*" in an initial litigation. *Kremer* v. *Chemical Constr. Corp.,* 456 U.S. 461 n. 6 (1982) (emphasis added). A federal court must afford res judicata effect to a final judgment rendered in a prior state court proceeding.[17]The concept is extremely pertinent here. If a property owner exhausts state proceedings to obtain a compensation remedy but receives no award, then *Williamson County* would deem her federal taking claim ripe and allow her to litigate the alleged constitutional violation in United States district court. A federal judge, however, could still preclude all federal court access under res judicata, because the property owner *could* have raised her Section 1983 claim for federal relief in the earlier state proceeding. Accordingly, even if the property owner strictly adheres to *Williamson County,* her failure to raise a *federal* constitutional claim in state court could destroy her chances from ever having a federal judge address the Fifth Amendment claim. I do not think that property owners should be *forced* to litigate federal takings claims in state court, yet this is the ironic effect of the synergy between ripeness and res judicata.

In my opinion, H.R. 2372 resolves this tension[18] as well as the problem identified by the Tenth Circuit in *Wilkinson* v. *Pitkin County Bd. of Comm'rs,* 142 F.3d 1319 (10th Cir. 1998). The court effectively ruled that the property owner, who initially filed its takings claim in state court, could never have a federal judge hear the takings claim because of the preclusion doctrines. As the court wrote, *Williamson [County's]* ripeness requirement may, in actuality, almost always result in preclusion of federal claims . . . It is difficult to reconcile the ripeness requirement of *Williamson County* with the laws of [issue and claim preclusion]." *Id.* at 1325 n. 4.

I believe that the cases requiring a plaintiff to seek compensation in state court "effectively drain the ripeness rules of any meaning. They prevent federal courts from ever reaching the final decision issue because, under this view, a takings plaintiff must seek compensation in state court until that court clearly says it will not entertain a compensation remedy." APA Brief at 24. In short, I wholly concur with H.R. 2372's objective to remove the state exhaustion requirement from the ripeness landscape.

IV. H.R. 2372 SECTIONS 3 AND 4: TAKINGS CLAIMS AGAINST THE FEDERAL GOVERNMENT.

A. In General. H.R. 2372 Section 3 proposes amendments to 28 U.S.C. § 1346. This provision confers concurrent jurisdiction in the United States district courts and the United States Court of Federal Claims for claims against the federal government, including Fifth Amendment takings, where $10,000 or less is at stake. Section 4 proposes amendments to 28 U.S.C. § 1491, the Tucker Act provision conferring exclusive jurisdiction in the United States Court of Federal Claims, for claims against the federal government (including takings) for more than $10,000. I am mindful that, considering the expense of takings litigation, Section 1346 is rarely invoked as a practical matter. However, I believe it is correct to amend both statutes to achieve consistency. The bill's reform measures should clarify court *access* to any takings claim against the federal government, whatever the amount.

B. Abstention. Sections 3 and 4 concern *federal* law suits premised on unconstitutional takings committed by *federal* agencies, under *federal* laws. For example, these sections would address "takings" by the U.S. Army Corps of Engineers under Sec-

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[17] *See* 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4466 at 30,042 ("Res judicata doctrine cannot escape the federalistic problems that permeate our overlapping systems of courts and substantive rights"). *See also id.* §§ 4469–4471 (federal courts supplying res judicata effect to state court decisions).

[18] The related doctrine of collateral estoppel, or issue preclusion, requires a federal court to avoid relitigating issues that were actually decided by, and necessary to, the judgment of a state court. *See Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 326 n. 5 (1979). Like res judicata, collateral estoppel's relationship to *Williamson County* prong 2 can prevent a property owner from ever litigating a federal taking claim in federal court. *See, e.g. Dodd* v. *Hood River County,* 59 F.3d 852, 861–62 (9th Cir. 1995) (although property owner exhausted compensation remedy under Oregon law, court remands for consideration as to whether related doctrine of collateral estoppel bars any further litigation in federal court).

tion 404 of the federal Clean Water Act; the U.S. Fish and Wildlife Service under the federal Endangered Species Act; the U.S. Environmental Protection Agency under federal Superfund; or the Department of Interior under the federal Surface Mining and Control Reclamation Act.

In these actions, no person would be acting under color of State law, and no parallel state proceedings could be instituted. Abstention thus is not an issue when property owners bring federal takings claims against federal actors.[19] For this reason, H.R. 2372 Sections 3 and 4, unlike Section 2, do not address the abstention problem.

C. Ripeness. In contrast, ripeness is an issue that federal courts have addressed in federal takings cases.[20] *See, e.g., Good* v. *United States,* 1997 U.S. Claims LEXIS 179, at *64–*71 (Aug. 22, 1997) (discussing the re-application requirement and futility exception, in case concerning wetlands permitting and endangered species issues). Federal courts have also addressed the issue of whether a takings claimant can avoid seeking a permit or variance from federal regulations under the "futility" exception. *See, e.g., Whitney Benefits, Inc.* v. *United States,* 18 Cl. Ct. 394, 407 (1989), *aff'd,* 926 F.2d 1169, 1171 (Fed. Cir. 1991), *cert. denied,* 502 U.S. (1991) (in context of facial challenge, takings occurred upon enactment of federal statute because it would have been futile to apply for permit; no opinion regarding same issue in context of as applied challenge); *Broadwater Farms, supra,* 35 Fed. Cl. at 236 (federal takings claim ripe where it would have been futile to apply for an "after-the-fact" wetlands permit from the Corps).

For these reasons, the bill properly incorporates ripeness reform measures for federal takings claims in new Sections 3 and 4, similar to those stated in Section 2 for Section 1983 actions. I propose that my suggested changes to the bill regarding "one meaningful application" and "futility," discussed earlier on pages 21–24 and 24–25, respectively, also be incorporated where appropriate in Sections 3 and 4 dealing with federal takings actions.[21]

V. H.R. 2372 SECTION 5: DUTY OF NOTICE TO OWNERS

This section requires a Federal agency to provide notice to property owners explaining their rights and the procedures for obtaining any compensation that may be due to them whenever that agency takes an action affective their private property. The goal of this section is both to provide property owners with the information they need to know to defend their rights, but also to force federal agencies to be more aware of the impact of their regulatory decisions. I believe this section will create a dual benefit of a federal government less likely to take property and a public better able to keep the government in check.

VI. CONCLUSION

The ripeness rules developed by the courts have caused hardship to property owners who seek court access so their constitutional claims can be heard. *Williamson County* and its progeny should no longer be misused to block takings cases where concrete and ascertainable injuries flow from final land use decisions. The Supreme Court has declared that "the takings clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First or Fourth Amendment, [and] should not be relegated to the status of a poor relation . . . " *Dolan* v. *City of Tigard,* 512 U.S. ——114 S.Ct. 2309, 2320 (1994). I believe that H.R. 2372 would help restore the takings clause to its deserved place of importance, and ensure that federal courts apply the takings clause to test the constitutional parameters of government action.

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[19] For example, in the myriad reported Section 404 takings cases brought against the Corps, issues of state property law have not arisen to the extent that abstention has become a concern. *See, e.g., Florida Rock Indus., Inc.* v. *United States,* 118 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor, Inc.* v. *United States,* 28 F.3d 1171 (Fed. Cir. 1994); *Tabb Lakes Ltd.* v. *United States,* 10 F.3d 796 (Fed. Cir. 1993); *Broadwater Farms, supra,* 35 Fed. Cl. 232 (1996); *Bowles* v. *United States,* 31 Fed. Cl. 37 (1994); *Formanek* v. *United States,* 26 Cl. Ct. 332 (1992); *Ciampitti* v. *United States,* 22 Cl. Ct. 332 (1991) *Deltona Corp.* v. *United States,* 657 F.2d 1184 (Ct. Cl. 1981); *Jentgen* v. *United States,* 657 F.2d 1210 (Ct. Cl. 1981).

[20] Exhaustion of remedies also can potentially delay federal courts from addressing the merits of federal takings claims. *See, e.g., Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1016–19 (1984) (provisions of Federal Insecticide, Fungicide and Rodenticide Act "implement[ ] an exhaustion requirement as a precondition to a Tucker Act claim"); *Burlington Northern R.R. Co.* v. *United States,* 752 F.2d 627 (Fed. Cir. 1985) (takings claim dismissed without prejudice because owner failed to apply for federal permit and government argued permit could be granted if sought). *Cf. Whitney Benefits, Inc.* v. *United States,* 752 F.2d 1554, 1558 (Fed. Cir. 1985) (pursuit of a coal exchange under 30 U.S.C. § 1260(b)(5) is not a remedy that must be exhausted before bringing suit under Tucker Act).

[21] The full text of Sections 3 and 4 with my suggestions are set forth at pp. 33–35.

Mr. CANADY. Thank you very much. I'd like to thank the members of the panel for your testimony. I now recognize Mr. Watt for any questions you might have.

Mr. WATT. Thank you, Mr. Chairman. I join you in expressing appreciation to the witnesses for being here and bringing forth your concerns.

Mr. Reahard and Mr. Goodwin, I want to let you know that, despite the fact that I'm probably in opposition to most of the provisions of this bill, it's not because I don't think local governments do crazy things.

They do crazy things. State governments do crazy things. Federal Governments do crazy things, too. It sounds to me like, in your case, Mr. Reahard, that you got to Federal court, it did something crazy, and then you went back to State court, and it did something crazy.

So, you're damned if you do or damned if you don't, so to speak. But notwithstanding that, there are certain protocols that have to be followed when you're dealing in a federalism context.

There are a lot of things that are in Federal court that I'd like to have back in State court. There's no procedure for doing that.

So, I appreciate the comments of all the witnesses. I think I understand where each of you is coming from. We'll take a close look at the bill and see if there's any way we can accommodate the comments that have been made, and concerns that both Mr. Canady and myself have in this area.

If we can come to some meeting of the minds, maybe we can move a bill. I don't think this is the bill. I don't think we should assert ourselves in this way at the Federal level.

But, I'm trying to be open-minded, and I'll continue to listen. I think I'll yield back.

Mr. CANADY. I appreciate that. Mr. Jenkins, do you have any questions or comments?

Mr. JENKINS. I do. Thank you, Mr. Chairman.

Ms. Shea, I agree with you when you say that cities—and we're all a part of the city, most of us, somewhere—adopt ordinances for the protection of all of us. I don't think we need to lose sight of that, but let me ask you something. Do you not have any sympathy for Mr. Goodwin and Mr. Reahard when you hear stories like this?

Mr. Reahard was in court for 15 years, finally got his case settled. Mr. Goodwin has been in court for 10 years and still doesn't have his case settled.

You heard the professor say that this is nothing new. The substantive law of the States is still going to control the lawsuit, that it's simply an enforcement of, not a statute, but the fifth amendment of the Constitution of the United States and whatever appropriate provision there might be in the State constitutions.

In view of that, what sympathies do you have for Mr. Goodwin and Mr. Reahard in their plight?

Ms. SHEA. I have great sympathy for their situations. I think that there are always going to be situations where a particular property owner, a particular developer, feels wronged and has been wronged.

The question really is what is the remedy for that wrong?

Mr. JENKINS. Tell us what it is.

Ms. SHEA. This bill is not the remedy for that wrong.

Mr. JENKINS. What is the remedy?

Ms. SHEA. It seems to me that the remedy needs to be at the State level where State laws are and can weigh the circumstances.

Mr. JENKINS. Ma'am, if these gentlemen and others—hundreds, thousands, tens of thousands of people—don't make those premises—I've practiced law. I've been a Circuit Judge for 6 years. I did a lot of practice in the condemnation area. You can grimace if you would like. But, let me tell you there are tens of thousands of people across this land who are in the same situation that these two gentlemen are in.

There are going to be hundreds of thousands of people in this same category, so what is their remedy if they can't get it in State courts? What would you suggest that they do?

Ms. SHEA. Mr. Jenkins, I don't believe that there is any evidence of thousands or tens of thousands, or hundreds of thousands——

Mr. JENKINS. You may not believe it, ma'am.

Ms. SHEA. We haven't seen any data, and there's been no data I'm aware of presented to this Committee or anyone else to show that this is a problem of such nationwide significance that it requires Federal courts overriding local decisionmaking. I think we would love to see some of that data.

Mr. JENKINS. If they can't get into State courts—They have said that they can't get into State courts, can't get a remedy. So, what is their remedy?

Ms. SHEA. I don't think we've heard that they can't get into Federal courts. I think we have heard that, in fact, they have been in Federal courts.

I don't think that's the issue. I think the issue we're dealing with today is whether we need a Federal statute, a hammer of this magnitude, to solve a problem about which we have no national data to show that there is, in fact, a national impact.

If Congress is going to use this kind of hammer to address some anecdotal situations, that's a frightening thing, I think, in establishing Federal policy.

This Congress, in partnership with the States and local governments, have been seeking, we think very successfully over the last several years, to empower the States and to empower local governments to make decisions at the level that is closest to the people.

This bill goes precisely in the wrong direction—in the opposite direction—of where the Congress says they believe we should be going.

I think that's the issue to be determined. Do these problems, brought to the attention of the Subcommittee, warrant the kind of massive Federal change in procedure that would have all these unintended consequences that we've mentioned? We don't think the case has been made that that needs to be done.

Mr. JENKINS. Let me ask, Professor Mandelker, do you agree with that assessment, sir?

Mr. MANDELKER. I certainly do not agree with that assessment. First of all, this bill is not a hammer of any kind. What's it hammering? It simply redefines——

Mr. CANADY. Without objection, the gentleman may have two additional minutes.

Mr. JENKINS. Thank you, Mr. Chairman.

Mr. MANDELKER. It simply redefines, as I said in my opening statement, the jurisdiction of the Federal courts. It's not a massive Federal change. It's simply an attempt to open the Federal courthouse door for litigants who ought to be there, and let me say that I think we should keep in mind what we are talking about here.

In addition to talking about the Federal Constitution, we are talking about the Federal judiciary which is created by the Constitution to hear claims under the Federal Constitution.

This is a judiciary that is competently equipped to do so. Because these claims cannot now get into Federal court, we believe that the bill has tremendous merit and should be enacted.

Mr. JENKINS. Do you have an opinion as to the number of claims that are out there? Do you agree with this lady that these two gentlemen, Mr. Goodwin and Mr. Reahard, are just isolated incidents?

Mr. MANDELKER. I do not agree. One of my former students, if I may say, is a leading land use lawyer and practitioner in California. As a matter of fact, he regularly advises his clients not to go to Federal court, because he feels he doesn't want to spend their money fighting the unfair ripeness rules. I don't know how many times he's told his clients that, but he tells me that this is the general understanding of the California Bar. That, I think, is pretty good evidence. I can't ask him, how many times have you told your clients not to go to Federal court? But, that's pretty good evidence that in one State, an important State, of how the Bar is reacting.

Mr. JENKINS. Let me ask you one other question. Is it reasonable for Mr. Reahard to spend 15 years, as he has described—and nobody has refuted any of the claims that he's made here—but, is it reasonable, under our system of justice, for him to have to spend 15 years to have his claim, not adjudicated finally, but finally settled after being whipped and tossed and thrown about the court system from the State courts to the Federal courts? Under any measure, anybody's assessment of it, is that reasonable?

Mr. MANDELKER. Certainly not. I think I can quote a statement. I think it was by one of the English Chief Justices. I hope I get it correct—"Justice delayed is justice denied."

Mr. JENKINS. Thank you, sir.

Mr. CANADY. Thank you, Mr. Jenkins. I now recognize myself. Let me say this. I'm the sponsor of this legislation. I think there's a problem here that needs to be addressed. Let me give you a little bit of my personal perspective on this.

I want to have a balanced system. Before I was a Congressman, I was involved in representing local government. I spent more time representing local government entities in a land use-related context than anybody in the private sector. I represented a regional planning council for some period of time, so I'm sensitive to the concerns of local government. I'm not looking for something that's going to hit on local government. I don't think that's right, but I do believe this—that there are Federal constitutional rights that individuals have in this country. They are entitled to have their fair day in court to have those rights adjudicated. I just think that's kind of fundamental to our system of government.

Ms. Shea, is it your position that people really don't have any Federal constitutional right or should not have a Federal constitutional right against regulatory taking? Is that your position?

Ms. SHEA. Mr. Chairman, that's not our position at all. I guess I would return the question.

Mr. CANADY. Well, I asked you a question.

Ms. SHEA. Then I'll put it in a statement.

Mr. CANADY. The question's been answered. You said—You've had your chance. This is my chance.

What about you, Mr. Barbieri? Is it your position that people do not have a Federal constitutional right that protects them against regulatory takings?

Mr. BARBIERI. Yes, Mr. Chairman. They do have a Federal constitutional right, and, at the present time, they have a Federal constitutional remedy, which is, in this case, to file those claims in State court. We are not talking about preventing people from raising Federal constitutional claims. It's just a question of whether they're going to be raised in Federal court, or, as in the present system, in State court. There's been no compelling reason put forward why those claims can't be just considered in State court.

Mr. CANADY. Do you think that should be a general rule for all Federal constitutional rights, that people should be able to raise them in State court but not in Federal court?

Mr. BARBIERI. No, it really depends on the nature of the Federal right. The fifth amendment takings right that we're talking about here is intrinsically different than other types of Federal constitutional rights.

Mr. CANADY. So you would create a separate category? When it comes to property rights, they fall under the category that says you've got to go to State court; all other Federal constitutional rights, you can go to Federal court.

Is that a fair summary?

Mr. BARBIERI. Not quite. First of all, the Supreme Court has made the distinction, because the Supreme Court has said that a Federal constitutional claim requires showing both that property has been taken and that there's been denial of just compensation. So, because of the nature of the constitutional right, you can't establish a violation until you've been to State court. That's why this is such a unique problem. It's not a question of trying to single out property rights for special treatment. It's the fact that it inheres to the nature of their right that they must go first to State court.

Mr. CANADY. That is one perspective on it, but I think, if you step back from all of this and try to look objectively at the way the system is working, you're going to conclude that people who have property rights claims are getting treated in an adverse fashion. That's what I conclude, and let me say this. I certainly don't want to do anything that's going to encourage people to file frivolous claims. I think sometimes people are dissatisfied with the zoning decision, and they should lose, because the local government was justified. But, I think there are other cases where the local government shows a callous disregard for the rights of people.

Basically, they just don't want to let them do anything on their property. They jerk them around, and I've seen this happen. They

jerk them around back and forth, back and forth. That's just not right. That is not right.

I want to have a system that is balanced and where people, who have cases like the cases we've heard, will have a remedy. Whether it's a hundred cases or a thousand cases where people are treated like that, I think they're entitled to a reasonable remedy, their day in court.

Then, you know, if they lose, I think in a lot of these cases you can probably get your attorney's fees from them. So, you know, it's a two-way street, and I certainly know the local governments to get attorneys' fees in cases like this.

So, the idea that all the advantage is on one side isn't right. Let me say this. It's my sense, at least from the National Association of Counties, from the statement that's been made here today, that you just don't want anything to do with anything like this.

That's your right, but, if anyone has a suggestion about ways that this bill could be improved and address these kind of problems, but not cause the kind of harm that you think that the bill in its current structure would cause, I'm certainly open to looking at suggestions.

I'm not saying that we have come up with a perfect solution. I will tell you I think there's a real problem, and I don't think it's responsible to take the position that we're just going to turn away from this and ignore it. I don't think justice is being done in these cases, and I think we have a responsibility in the Congress to help ensure the sound administration of justice.

That's not just for the courts. We have a responsibility in the Congress to do our part in helping ensure that. That's something I'm committed to, and I think the majority of the House is committed to that in this context, at least as the vote in the last Congress would indicate.

If there are suggestions about ways this legislation could be rendered less onerous from the local government's perspective, I'm certainly willing to entertain that.

I believe that other members would be, as well, but I think, quite frankly, the attitude Ms. Shea has exhibited, I don't think is very constructive.

I'll tell you. I worked very closely with the counties in my district, and it's my view that you don't represent them very well when you come before the Congress with the kind of attitude that you've exhibited today. That's my personal opinion. You're entitled to say whatever you please, but that's my view. I remain open to suggestions for dealing with this issue, which I think is a real issue that involves fundamental questions of justice.

Again, I want to thank all of you for taking the time to be here today, and we look forward to further consideration and proceedings with respect to this legislation.

The subcommittee stands adjourned.
[Whereupon, at 11:05 a.m., the hearing was adjourned.]

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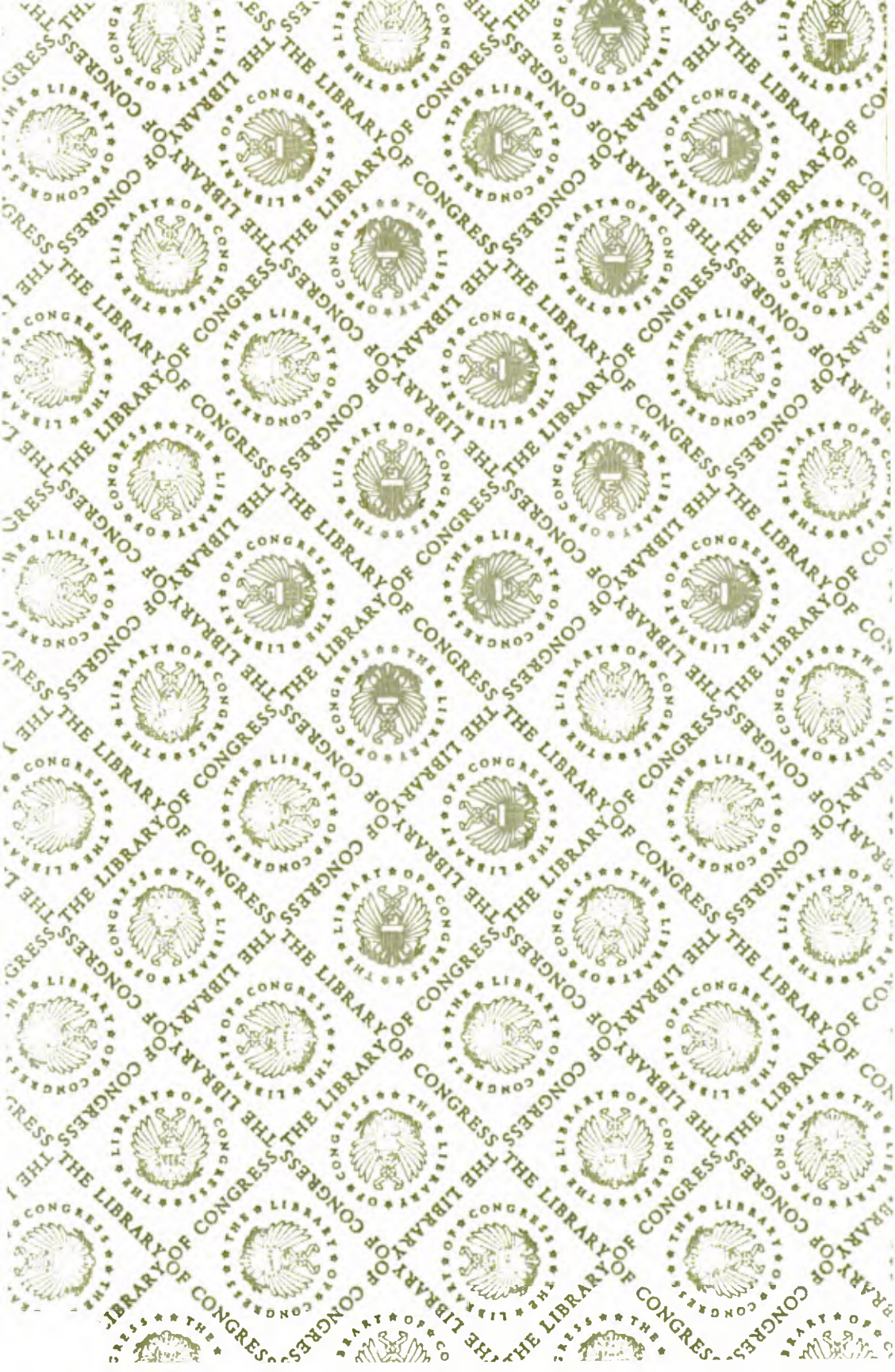
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